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NON-FEASANCE REVISITED

In 1914, the late Sir William Harrison Moore made the first considerable examination of the doctrines of non-feasance and misfeasance as applied to road and drainage authorities.[1] He pointed out that such distinctions occur in many parts of the law, instancing in particular the role they played in the early history of English tort and assumpsit[2]; it may be added that even in Aquilian liability for fault under the Roman law, it has sometimes been found necessary for policy reasons to recognise areas of non-liability for "mere omissions."[3] But he showed that it is in administrative law that the distinction has come closest to a precise technical doctrine, and to this we may add that in the modern Roman-Dutch law of South Africa, it is in the sphere of the liability of road authorities that the rule about non-liability for "omissions" under the Aquilian law has had its most specific application—though doubtless here as with other subjects the example of English law has had its effect.[4] It is interesting to trace through Moore's articles a development of opinion similar to that which can be traced through judicial decisions and dicta, and non-judicial writings, ever since. In some passages, Moore praises the policy which he finds in the decisions making administrative authorities not liable for "mere non-feasance"; he says it is "a rule especially appropriate to a comparatively new class of incorporated public authorities which (are) not the grantees of conditional rights and privileges voluntarily accepted by them, but mere bearers of burdens," and he states that the rule "is not limited to the case of non-feasance on a highway."[5] But after fighting his way through the English drainage cases from *Glossop* v. *Heston and Isleworth L. B.*[6] on, he finished with a series of recommendations

1 30 L.Q.R. 276, 415. Moore was Professor of Law at the University of Melbourne.
2 *Ibid.*, at p. 278.
3 See F. H. Lawson, *Negligence in the Civil Law*, esp. pp. 32–36.
4 See T. W. Price in 66 *South African L. J.* 171, 269, quoted by Lawson; *Halliwell* v. *Johannesburg*, 1912 A.D. 659.
5 30 L.Q.R. at p. 417.
6 (1879) 12 Ch.D. 102 (C.A.).

which would confine the non-feasance rule in its full significance to highways.[7] In 1925, Gleeson Robinson reached a similar conclusion.[8] In *Pride of Derby* v. *British Celanese*,[9] Evershed M.R. deprecated the use of the term "non-feasance" in relation to drainage authorities,[10] while Denning, L.J. said "it would be very unfortunate if the exemption for non-feasance was extended to local authorities generally," and endeavoured to explain away the use of the word "non-feasance" in drainage contexts[11]; Denning L.J. described the dictum of Scrutton L.J. in *Hesketh* v. *Birmingham*[12] ("the general rule is that a local authority is liable for misfeasance, but not for non-feasance"), as a case of Homer nodding.

Basic Non-feasance

There is one sense in which the absence of a legal liability for omission to act is accepted for public authorities generally; it is strongly presumed that the citizen cannot complain about their failure to provide him with a general service or advantage, such as a highway or a drain—certainly not if the authority is merely empowered to provide the service, and usually not even when the authority is commanded to do so. Lord Romer said in *East Suffolk Rivers Catchment Board* v. *Kent*[13]: "Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power." The case of duty has always presented more difficulty. It is unlikely that in *Couch* v. *Steel*[14] Lord Campbell intended to lay down a general doctrine that every statutory duty creates a correlative right in individuals who might benefit from the performance of the duty, but on a loose reading the dictum he quotes from Comyns' *Digest*[15] might be considered as supporting so wide a rule, and in *City of Vancouver* v. *McPhalen*,[16] Idington J. of the Supreme Court of Canada expressed his sorrow that the courts had not given *Couch* v. *Steel* a wide extension, instead of niggling it down to a minimal operation in administrative law contexts. His Honour said: "The sooner the distinction between non-feasance and misfeasance as applicable to actions on a statute of which the plain language indicates it can be as grossly violated by an omission to do something, as by doing

[7] 30 L.Q.R. at pp. 426 *et seq.*
[8] *Public Authorities and Legal Liability*, pp. 134 *et seq.*
[9] [1953] Ch. 149 (C.A.).
[10] [1953] Ch. at pp. 175–6.
[11] *Ibid.*, at p. 188.
[12] [1924] 1 K.B. 260 at p. 271.
[13] [1941] A.C. 74 at p. 102.
[14] (1854) 3 E. & B. 402
[15] "Action upon Statute" (F). Thayer shows (27 Harv.L.R. 332) that the passage is from a judgment of Lord Holt (6 Mod. 27) dealing with statutes in aid of vested rights.
[16] (1911) 45 S.C.R. 194.

a wrongful act forbidden by it, is discarded, the better." The Canadian Supreme Court accordingly held that the Vancouver Incorporation Act, 1900, imposing a duty on the city to repair roads, enabled citizens to sue for negligent non-repair. It is a decision which can be reconciled with that of the House of Lords to the contrary in *Cowley* v. *Newmarket Local Board* [17] only by a quibble. The narrower and well-established rule of the early nineteenth-century common law that indictable breach of a statute gives rise to an action for damages at the suit of one specially injured [18] seems to have suffered, more by silence than anything else, a similar subjection to the modern requirement that the statute must be intended to benefit a particular class of whom the plaintiff is one [19]; in any event, modern administrative statutes rarely impose a duty to provide services, and those that do frequently provide summary or other remedies so as to exclude indictment and thus make the narrower rule inapplicable.

There is a slide from this basic non-feasance situation to the situation, established by *Mersey Docks Trust* v. *Gibbs*,[20] of liability on ordinary principles modified by any relevant provisions of the statutes governing the authority in question. The courts frequently speak as if liability depends wholly on the statute, but as Moore pointed out [21] the usual function of the statute is to establish a relationship (of ownership, control, or in general responsibility) between an authority and a set of activities, such that liability for the activities on grounds taken from the general law can reasonably be attributed to the authority. It will be suggested later that policy considerations have played a major part in these cases. So far as "logical" development of concepts has been important, most of it has stemmed from the *Mersey Docks* v. *Gibbs* end of the slide; the familiar categories of tort-liability provide many more premises for judicial reasoning than can a bare assertion of non-liability. Nevertheless, reasoning can be found which takes its start from the other end of the slide—from the basic non-feasance situation. For example, Jordan C.J., dealing with a drainage problem in the Supreme Court of New South Wales,[22] proceeded immediately from non-liability for failure to provide a drain to the case of a drain duly provided which removes surplus water from a property, but is carelessly allowed by the authority to become choked and hence "less ameliorative"; this,

17 [1892] A.C. 345.

18 *Lyme Regis* v. *Henley* (1834) 8 Bli.(N.S.) 690 (H.L.).

19 The existence of alternative remedies in the statute has always provided another possible explanation of the cases *denying* a private action, so that the situation is made clear only by examining the cases (mainly on factory legislation) *sustaining* such action; typical dicta from both series are cited in Robinson, *Public Authorities and Legal Liability*, at pp. 104–5.

20 (1866) L.R. 1 H.L. 93.

21 30 L.Q.R. at p. 280.

22 *Campisi* v. *Water, etc., Commsn.* (1936) 36 S.R.(N.S.W.) 631 at p. 639.

observes Jordan C.J., would also be a case of non-feasance and there would be no liability to the property owner. It is a short step from this situation to the one which caused such strong differences of opinion during the passage through the courts of *East Suffolk Rivers Catchment Board* v. *Kent*[23]; the defendant authority intervened, when it could without liability have remained aloof, in order to drain flood waters from the plaintiff's fields, but did so with such ineptitude that the fields were left flooded for a longer time than they would have been if the operation had been performed with reasonable skill. Lord Atkin, dissenting, had no difficulty in fitting this into a concept establishing liability, and advanced policy reasons for following such a course.[24] The majority, holding for the authority, applied the reasoning adumbrated by Jordan C.J. in *Campisi* (*supra*); inadequate "amelioration" was no more actionable than none at all, but Lord Porter at least felt sufficiently uneasy about the logic to answer Lord Atkin with counter-considerations of policy as well.[25]

A third step might also be regarded as developing "logically" from basic non-feasance. An authority inherits, whether from public or private predecessors, a service which when inherited is injuriously defective in respects which the authority has power, express or implied, to remedy. The courts will not expect the authority to bring in the millennium overnight, but if a plaintiff allows the authority a decent interval in which to learn of the situation and take suitable action, can he then sue for failure to do so? If we concentrate on the statutory power or duty to maintain and repair, this situation looks very like basic non-feasance, failure to confer an expected benefit; the decisions denying liability in *Glossop* v. *Heston and Isleworth*,[26] *Att.-Gen.* v. *Dorking Union*[27] (drainage) and *Shield* v. *Huon*[28] (road and drain) can be read thus. But if we concentrate on the relationship of the authority to a state of affairs in being which would constitute in private hands a nuisance, then the important analogies seem to come from the general law of torts; it would be unhistorical to expect profound uneasiness at a decision in favour of immunity in the Court of Appeal during the nineteenth century, since the liability of occupiers for nuisances not of their making or adoption was not clearly settled until well into the twentieth,[29] but by 1911 Parker J. was beginning a campaign to discredit the *Glossop* decision.[30]

[23] [1941] A.C. 74.
[24] *Ibid.*, at p. 88.
[25] *Ibid.*, at p. 106.
[26] (1879) 12 Ch.D. 102.
[27] (1881) 20 Ch.D. 595 (C.A.).
[28] (1916) 21 C.L.R. 109 (H.C. of Austr.).
[29] *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880.
[30] *Jones* v. *Llanwrst U. C.* [1911] 1 Ch. 393 at p. 404. Parker J. purported to find difficulty in discovering an agreed *ratio decidendi* in *Glossop*. It seems plain enough, however, that the observations of Brett and Cotton L.JJ. in *Glossop* were supplementary to those of James L.J., not in disagreement with his reasoning; otherwise it is difficult to believe that they would have

In the drainage cases, a complicating factor was the possible existence of prescriptive private rights to discharge into "inherited" sewers, and the absence of any legislative machinery for disposing of such claims. In the United Kingdom and in many parts of the Commonwealth, the problem of inherited nuisance is unlikely to recur; it was characteristic of the reorganisation of local government in the nineteenth century. Where it does, and in countries like India where it may still be frequent, apt statutory provision ought to be made in the light of the puzzles raised by such cases as *Haigh* v. *Dendraeth R. D. C.*[31] Failing such provision, it is difficult to escape the obvious "basic non-feasance" element in the cases on inherited systems; the defendant in the *Dendraeth* case was a little unlucky in having its position brought before the courts so long after most such examples of inherited systems had disappeared, and it is possible that fifty years earlier the decision would have been different, since the element of addition to the nuisance by the acts of the authority was small, whereas in *Jones* v. *Llanwrst U. C.*[32] (which Vaisey J. applied in *Dendraeth*) it was appreciable.

Roads

The historical development of these doctrines has not, of course, followed the logical path so far traced. It has instead been a part of social development in which practical problems have been solved as they occurred by reference (in this case often explicit) to policy considerations supported by a minimum of doctrinal reasoning; the earliest and still by far the most important case is the liability of public road authorities for the various kinds of dangerous road conditions—inherited, caused by the elements, caused by third parties, or caused by the authority or its servants and contractors—which by a law of nature will always find a member of the public anxious to be injured and eager to resent the injury. The history of the road cases has been many times summarised. A. T. Denning, as he then was, gave an account in 1939[33] which is a masterpiece of condensation, but which necessarily suffered from its brevity; in particular, it fails to emphasise the part which considerations of policy have played in the history of the road non-feasance rule since 1788. The High Court of Australia re-examined

acquiesced in a special order for costs which depended on James L.J.'s view of the issues; see (1879) 12 Ch.D. at p. 130. Similarly the criticism of *Glossop* by Evershed M.R. in the *Pride of Derby Case* [1953] Ch. at p. 170, does less than historical justice to his predecessors of 1879. His Lordship observes that James L.J. may not have fully appreciated *Glossop's* claim "as pleaded," but it was not unreasonable of the *Glossop* court to be guided less by the pleadings than by the known history of the negotiations between the parties and the report of an official referee.

31 [1945] 2 All E.R. 661. Defendant authority held liable for nuisance of untreated sewage from an inherited system.

32 See n. 30 above. *Jones* was another example of an authority being held liable.

33 55 L.Q.R. 343.

the history in 1936,[34] the Supreme Court of New Zealand in 1942,[35] and the High Court of Australia again, at great length, in 1950 [36]; in 1951 W. Friedmann, deploring the survival of the old doctrine, emphasised the "escape clauses" available for modern courts.[37]

The position finally established is that road authorities are not liable to individuals for failure to repair dangerous conditions in a roadway which are not due to deliberate or careless *activity*, "mal" or "mis"-feasance, of the authority itself or its servants and contractors. This rule has been applied to both local and central road authorities, and to departments of the Crown as well as to autonomous statutory corporations.[38] The scope of the rule has been narrowed by one well-established and one disputable judicial escape mechanism.[39] The well-established device is to attribute the dangerous condition to a state of affairs in the road resulting from the exercise of powers other than the power to build and maintain the road—for example, power to drain the surrounding countryside,[40] or to direct traffic.[41] This may involve some arbitrary attributions of official acts, and difficulties concerning onus of proof which have not as yet been resolved; in the High Court of Australia, Latham C.J. favoured the view that, if attribution is in doubt, the onus is on the authority to bring itself within the exception rule by showing that it acted wholly under the "road" power, while Dixon J. favoured the view that the onus was on the plaintiff to show that the activity did *not* fall within the immune category.[42] The disputable device is to hold the authority more fully responsible for "artificial" structures in a highway, as distinguished from the "highway proper." This is a very artificial rule, since once a road has been made up at all it is wholly, in one sense, "artificial," it is an artifact; but such a concept has the advantage of providing a wider escape clause than the "source of authority" rule, if escape is considered desirable, since the authority would be liable for drains, culverts, bridges,

[34] *Buckle* v. *Bayswater Road Board*, 57 C.L.R. 259. See the comment by this writer in 12 Aust.L.J. 231.

[35] *Gascoyne* v. *Wellington City Corporation* [1942] N.Z.L.R. 562, and see the comments of a learned contributor in 26 *New Zealand L.J.* 49, 65.

[36] *Gorringe* v. *Transport Commission*, 80 C.L.R. 357.

[37] 5 *Res Judicatae* 21. In similar vein, see a learned article in 88 *Irish Law Times* 99, 105.

[38] *Quinn* v. *Minister of Commerce* [1954] N.I. 131 (Supreme Court of Northern Ireland). In this case, Lord MacDermott C.J. also discusses the position of independent contractors to road authorities, and of local authorities to which a central authority has delegated repair functions. Neither can be affected by the special doctrines applicable to road authorities, since they are not occupiers nor under any statutory duty; hence the discussion of this problem in English opinions which Lord MacDermott criticises was quite misconceived, and the liability of such defendants is governed solely by the ordinary negligence principle.

[39] Friedmann, *op. cit.*, subdivides those mechanisms further.

[40] *Newsome* v. *Darton U. D. C.* [1938] 3 All E.R. 93.

[41] *Skilton* v. *Epsom, etc., U. D. C.* [1937] 1 K.B. 112.

[42] *Buckle's Case*, 57 C.L.R. 259.

etc. constructed wholly or mainly for road purposes—or (if Dixon J. was right on the onus question) not shown to be otherwise. The artificial structure rule was clearly stated by the Privy Council in 1879,[43] and acted on by McTiernan J. in the High Court of Australia in 1936[44] and has been approved in dicta of Australian, New Zealand and Canadian judges.[45] But the Privy Council's decision has in other respects been so disrespectfully treated, both in the Board and in the House of Lords, that it may not be a very satisfactory source for any rule, or exception to rule.[46] In *Gorringe*[47] the High Court of Australia at least by implication rejected the " artificial structure " escape, since it was there dealing with the wooden bridging over a culvert—plainly as much an " artificial structure " introduced into the roadway as the barrel drain which caused the trouble in *Bathurst* v. *Macpherson* and the agricultural drain which McTiernan J. was prepared to treat as an artificial structure in *Buckle's* case. But the High Court held that failure to repair the culvert was non-feasance and not actionable. On the other hand, in 1952 the Supreme Court of British Columbia applied the " artificial structure " escape rule when holding a road authority liable for a collapsed culvert.[48] There seems no good reason why the courts should not apply *both* the " source of authority " *and* the " artificial structure " escape rules. But a rational solution of the onus of proof problem in *Buckle*, and of the artificial structure dispute, requires a preliminary decision of policy; does the social reason for the road non-feasance rule still exist?

In the road cases, the judges have always been particularly explicit about the policy justifying decision and rule. In *Russell* v. *Men of Devon*, which begins the modern history, Lord Kenyon C.J. said: " If this experiment had succeeded, it would have been productive of an infinity of actions."[49] In *Young* v. *Davis*, after the procedural reasons for refusing recovery in highway non-feasance cases had largely disappeared, Pollock C.B., upholding the old rule, said: " I think it is sometimes desirable to present a legal decision in a popular form "; after that apology, he explained the non-feasance rule as follows: " the traveller was expected to take care of himself, and if the road was a little out of repair, to proceed with caution and not when he met with an accident to throw on other persons the blame of that which was owing to his

[43] *Borough of Bathurst* v. *Macpherson* (1879) 4 App.Cas. 256.

[44] *Buckle's Case*, *supra*.

[45] Australian and N. Z. examples are collected by this writer in 12 Aust.L.J. 231. For Canada, see *Sowles* v. *Surrey* [1952] 1 D.L.R. 648.

[46] See 12 Aust.L.J. at p. 233, and *per* Dixon J. in *Buckle*, *supra* at pp. 290 *et seq.*: another example of historical unfairness.

[47] 80 C.L.R. 357.

[48] *Sowles* v. *Surrey* [1952] 1 D.L.R. 648. A very large culvert which also served as a passage for cattle.

[49] (1788) 2 T.R. 667 at p. 673.

own want of caution." [50] This and other cases of the period also advance the danger that men will not accept office on highway boards if they are to be exposed to such actions; such objections might have contributed to the establishing of a general immunity from tort liability of all public authorities exercising governmental functions, an immunity actually established in the U. S. A., and finally given the quietus in England only in the *Mersey Docks* case. In *Saunders* v. *Holborn D. B.*, after the House of Lords had finally accepted the road non-feasance rule, Charles J. when applying it said that he "need not refer to the serious results which would attend a contrary construction," but following a common judicial practice he went ahead and did so: "it would be a most extraordinary piece of legislation if anyone injured by the failure of a local authority to cleanse the streets were able to bring an action." [51] It is not unreasonable to suppose that the administrative and financial problems of local authorities, the probability of numerous claims and the desirability of encouraging a high standard of self-help among road users were present to the minds of most of the judges in the series of cases ending with *Sydney* v. *Bourke* (1895),[52] in which the Privy Council finally adopted the non-feasance rule for Australia in spite of the quite different history of road maintenance in that country.

Some comparison from jurisdictions in which the non-feasance rule has not been applied by virtue of the English cases supports the view that highway liability presents special problems of policy. In South Africa, as already indicated, the Appellate Division of the Supreme Court has developed a doctrine closely similar to the effect of the English rule plus the English "artificial structure" escape clause; a road authority is liable for misfeasance in the English sense and also for failure to repair any "new source of danger" which its activities might create, such as a type of surface particularly likely to break up.[53] In *Murray* v. *Bulawayo Municipality*, Beadle J. of the Supreme Court of Southern Rhodesia explained the rule on policy grounds similar to those of the English cases; he emphasised the danger of a rule which might discourage road authorities from undertaking building and repair.[54] In Canada, several provinces have adopted statutory codes which expressly make road authorities liable to actions for damages for failure to repair, but the liability is restricted in ways which vary from province to province. The latest consolidation is that of

[50] (1862) 7 H. & W. at p. 770. The decision was affirmed in the Exchequer Chamber without reference to the policy, 2 H. & C. 197.

[51] [1895] 1 Q.B. at p. 70.

[52] [1895] A.C. 433.

[53] *De Villiers* v. *Johannesburg* [1926] A.D. 401; *Cape Town* v. *Clohessy* [1922] A.D. 4. In the *Halliwell Case* [1912] A.D. at p. 670, Innes C.J. suggested that the "new danger" rule could become part of English law.

[54] 1952 (4) S.A.L.R. 575 at p. 583. Southern Rhodesia has Roman-Dutch law and accepts the authority of S.A. Appellate Division decisions.

Ontario, a case of particular importance [55]: claims must be brought within three months of accident, liability for absence or presence of rails and guards is excluded, liability is confined to the state of the "travelled portion," liability for presence of snow and ice is confined to cases of "gross negligence," notice of action is required,[56] and recovery is confined to "particular loss or damage beyond what is suffered in common with all other persons affected by the want of repair." These restrictions apply to claims based on misfeasance as well as non-feasance, and as a result of judicial decisions tending to place "malfeasance" claims in a separate class outside the statute, it is now provided that the restrictions also apply to actions based on nuisance. In Manitoba, the code requires that damaged vehicles be produced to the clerk of the road authority within 48 hours, or left *in situ* for him to see, as a condition of action.[57] In Quebec, no general immunity for non-feasance has been deduced from fault liability,[58] as in South Africa, but the responsibility of municipal authorities is tempered in accordance with their wealth and manpower [59]; damage to the springs of a vehicle, and injury from flying stones, are excluded from recovery by the Roads Act, section 35.[60] In the U. S. A., on the other hand, the whole question has been much complicated by the doctrine of tort immunity for all governmental functions, even when exercised by autonomous authorities. The modern trend has been to treat road maintenance as a "ministerial" or "proprietorial" function, or to treat road statutes imposing a duty to repair (especially municipal charters) as creating private rights to damages, in some jurisdictions with "non-feasance" exceptions like the English but in most without.[61] Scotland has neither a general non-feasance doctrine nor statutory equivalents, and cases have been very few; the rule of nature that every hole in the road finds its litigious victim appears not to apply in that jurisdiction.[62] These comparisons, and in particular the Canadian experience, suggest that if the erosion of the English non-feasance rule along the lines described and praised by Friedmann goes much further, some of the road authorities formerly protected by that rule will have to seek legislative intervention.

Does the road non-feasance rule carry the immunity of authorities much further than the rules derived from basic non-feasance require? Somewhat, but having regard to the escape

55 Revised Statutes, 1950; Municipal Act (c. 243), ss. 453, 454.

56 With provision for exemption in special cases.

57 Municipal Act, 1933, s. 451; see *Walker* v. *Whitewater* [1938] 3 D.L.R. 284.

58 Civil Code, art. 1054.

59 *Cf. Montreal* v. *Leveille* (1952) R.L. 33 with *Lafond* v. *Longueil* (1952) Que.S.C. 73.

60 Revised Statutes, 1941, c. 141.

61 See 40 Corpus Jur. sec. (Highways) 250–62; 63 *ibid.*, (Municipal Corporations) 782 and the note to *Skiris* v. *Port Washington* 109 A.L.R. 599.

62 *Rinnell* v. *Glasgow*, 1950 S.C. 573.

clauses, not so far as the condemnations of the rule, judicial and other, might lead one to expect. It depends to some extent on the theoretical basis of liability. In the High Court of Australia, Sir Owen Dixon, that great master of the common law and now Chief Justice, has insisted that road authorities can never be regarded as quasi-occupiers and liable as such [63]; their legal responsibility, he says, stems wholly from their position as bearers of statutory duties or powers, and this is also the prevailing view in the U. S. A. On such a view, the authority's responsibility can flow only from some personal connection with a public nuisance in the highway; most of its immunity comes well within the principle of failure to ameliorate, or to ameliorate sufficiently, under statutes which even if expressed in terms of duty are for the benefit of the general public and not of a limited class. The immunity goes further than basic non-feasance requires only in that the authority escapes responsibility for the decay of road surface, road drains, curbing, etc., even when the dangers so created are such as would not have occurred but for the authority's intervention [64]; bold development of the "artificial structure" exception would go far to eliminate even this extension of basic immunity. The immunity is made to appear greater by considering the liability for "non-highway" structures; they too are usually present pursuant to the exercise of statutory powers or the discharge of statutory duties owed to the public at large, but careless omission to keep in repair carries liability to individuals, even though the general position of the public, taking the defective structure into account, is much "ameliorated" as compared with the position before the authority took over. But the extent of the unusual immunity of road authorities seems wider if, contrary to Dixon C.J.'s view, we consider road authorities as having a bundle of rights, powers and privileges in relation to a road which places them in a position analogous to that of an occupier. O'Halloran J.A. of the Supreme Court of British Columbia has expressed a robust preference for this view,[65] and indeed it is not easy to provide a doctrinal justification for the "non-highway" or "artificial structure" liabilities on any other view. Even when courts officially endorse the "statutory power" view, it may be suspected that they feel some discomfort about the extent of highway authority immunity because it is more "natural" to regard the authorities as occupiers.

[63] In *Buckle*, *supra*, at p. 281, and in *Gorringe*, *supra*, at p. 369.

[64] It is *at* this point that the immunity in South Africa stops.

[65] *Mainwaring* v. *Nanaimo* [1951] 4 D.L.R. 519, at p. 521; *Sowles* v. *Surrey*, *supra*, at p. 649. Such an attitude seems indisputably correct when, as in South Australia, the fee simple in roads is vested in an authority; S.A. Local Government Act, 1936, s. 365.

Drains [66]

It has already been suggested that the foundation English drainage cases, *Glossop* (1879) and *Dorking* (1881), illustrate in the main the basic non-feasance situation of an inherited nuisance not removed. In both, the difficulty of private prescription was prominent; the public at large cannot have such a prescriptive privilege, nor could the authority as such claim one,[67] yet to treat the plaintiff or relator as suddenly acquiring a right to the removal of an old nuisance would have been attributing an unlikely intention to the Public Health Act, 1875. The long judgments in these cases discuss many facets of what was a substantially new problem of public law. Were the reformed drainage authorities to be treated, on the model of the *Mersey Docks* case, as occupiers of the drains and as such liable for nuisance under the ordinary and somewhat strict rules? In *Dorking*, Jessel M.R. suggested that the statutory relation was not sufficient to justify such a view, and this is similar to the Dixonian doctrine on roads. Jessel M.R. did not persist with this argument; the cases were decided on an assumption, never since rebutted, that "vesting" is sufficient to make a drainage authority prima facie liable under the general law, by analogy with the position of occupiers. But the ability of the authority to control the condition of the drains was clearly limited in ways not applicable to private occupiers. It could not prevent prescriptive users of existing inadequate systems from continuing to use them. Section 21 of the Public Health Act, 1875, and its successor, section 34 of the Public Health Act, 1936, gave individuals a statutory right to make connection with a sewer, subject to conditions which did not include a consideration of the adequacy of the system to carry the additional burden.[68] The presence of a statutory power was felt to be in some way inconsistent with the existence of strict liability, such as a private occupier would incur; in one early case (1874)[69] Brett J. said it would be "contrary to natural justice" to make a Vestry strictly liable for the condition of drains. It is impossible to be fair to the Court of Appeal of that period without treating its decisions as part of a historical process, the reform of English local government and sanitation; looking at the decisions thus, one must admire the combination of legal and social insight which the judges displayed, and their sensible solution of policy difficulties which the Parliament ought to have anticipated.

In one respect the drainage cases never adopted the non-feasance rule finally affirmed for roads by the House of Lords in

[66] Including, herein, sewers, irrigation ditches, etc.

[67] *Brown* v. *Dunstable* [1899] 2 Ch. 378.

[68] Other statutes may give drainage authorities a wider discretion, which may affect responsibility for an overloaded sewer; *e.g.*, Victoria, Melbourne & Metropolitan Board of Works Act, 1928, s. 156.

[69] *Hammond* v. *Vestry of St. Pancras*, L.R. 9 C.P. 316.

Cowley's case (1892). A possible analogy with the latter would have been to hold that drainage authorities are not liable for careless failure to repair or clean a drain which decays or becomes blocked or is injured by third parties, but the analogy was never drawn, and drainage authorities are liable for such omissions.[70] But the complex factors present in the *Glossop* and *Dorking* cases left a heritage after the historical problem of the inherited systems and their prescriptive users had largely passed away. This was the problem of the modern system, originally adequate, which becomes inadequate owing to the growth of population, the building of houses, the spread of reticulated water and consequent ability to put in privies, the paving of roads and consequent rainwater run-off into drains and sewers instead of absorption. If the drainage authorities are regarded as occupiers owing at least the sort of duty of care set out by Lord Blackburn in *Geddis* v. *Bann Reservoir*,[71] there is no reason why they should not be liable for damage resulting from careless failure (having regard to their resources) to adapt their systems to such changes. Perhaps the courts would ultimately have held for liability, if there had not been a case connecting the predominantly "inherited" problem of *Glossop* with the predominantly "developmental" problem of *Hesketh* v. *Birmingham* (1922).[72] This was *Robinson* v. *Workington*, decided by the Court of Appeal in 1897.[73] The House of Lords and Privy Council decisions finally establishing the road non-feasance rule were now available and much relied on, and though the developmental problem was already prominent, the inheritance problem and the policy considerations of *Glossop* and *Dorking* were also still much in the mind of the Court of Appeal, and under all these influences the decision was in favour of the authority. A similar decision had been given in Ohio in 1884.[74] The question did not squarely come before the Court of Appeal again until *Hesketh* in 1922, and then appeared wholly as a developmental problem; *Robinson* v. *Workington* was followed. It did not come squarely before an American court again until 1930, when the Supreme Court of Washington decided the other way.[75]

In the *Pride of Derby* case[76] the Court of Appeal was obliged, reluctantly, to treat the English decisions as establishing for drains a special non-feasance doctrine, *viz.*, exemption from liability for inadequacy which has come about through "natural growth," and

[70] *Baron* v. *Portslade U. D. C.* [1900] 2 Q.B. 588; *Willoughby* v. *Halstead* (1916) 22 C.L.R. 352; *Campisi* v. *Water Commsn.*, *supra*.
[71] (1878) 3 App.Cas. 430, at pp. 455–6.
[72] Not reported until [1924] 1 K.B. 261 (C.A.).
[73] [1897] 1 Q.B. 619 (C.A.).
[74] *Springfield* v. *Syracuse*, 39 Ohio St. 665.
[75] *Boyer* v. *Tacoma*, 70 A.L.R. 1342; and see the note at p. 1347. In many states the doctrine of "governmental function" has complicated the drainage as well as the road liability problem. See Corp.Jur.Sec. 28 (Drains) 51.
[76] *Supra*.

this doctrine likewise has been clearly recognised and applied in Australia,[77] and its authority has been recognised in Canada,[78] though there there are no clear examples of its application. Traces of a similar rule can be found in at least one South African decision.[79]

The restriction of this immunity has come mainly from its own terms. As time passes, it is very likely that positive operations of the authority which it need not have undertaken will play an increasing part, and if overloading occurs, a triable issue of negligence will be presented. The Privy Council provided a leading example of this approach in *Kannaluik* v. *Hawthorn*,[80] and Scrutton L.J. certainly nodded when in *Hesketh* he endeavoured to explain that case away as due to a peculiar Victorian statute. In the *Pride of Derby* case, Denning L.J. suggested that modern English local authorities will rarely be in a position to rely on *Hesketh*, since their own housing activities will be a major element in the loading of drains[81]; that is a factor less likely to be present in other parts of the Commonwealth, and Denning L.J.'s confidence about the English position was very shortly proved unjustified when in 1954 Upjohn J. was obliged (after many doubts) to apply the *Robinson–Hesketh* doctrine.[82] In England, another distinct technique for avoiding the implications of the *Robinson–Hesketh* series has been to give the purity of streams and the sea a preferred position, by reason of the specific prohibition of pollution in the Rivers Pollution Prevention Acts,[83] and in the Public Health Acts.[84] How far the latter constitutes a separate and overriding doctrine it is difficult to say, because in the cases where it has been prominent there has also been a considerable element of "misfeasance" within the terms of the exempting principle. For example, in *Jones* v. *Llanrwst U. C.*[85] the authority had enlarged the sewers which poured untreated effluent into a stream; in *Foster* v. *Warblington U. D. C.*[86] it had enlarged sewers and ordered installation of water closets. In the *Pride of Derby* case quite a new distinguishing factor was discovered in the interposition of a treatment plant on the authority's own land, whose defective performance caused pollution of a stream. In this "rough sea of authority"[87] special problems are very

77 *Essendon* v. *McSweeney* (1914) 17 C.L.R. 524; *Madell* v. *Metrop. Water Board* (1935) 36 S.R.(N.S.W.) 68. In the latter case, Davidson J. (at pp. 72 *et seq.*) attempts to fit the cases into a code.
78 *Johnson* v. *Dundas* [1945] 4 D.L.R. 624 (Ontario H.C.).
79 *Johannesburg* v. *South African Realty Trust Ltd.* [1927] A.D. 163.
80 [1906] A.C. 105.
81 [1953] Ch. at pp. 190 *et seq.*
82 *Smeaton* v. *Ilford* [1954] Ch. 450.
83 1876, s. 3; 1951, s. 2.
84 1875, s. 17; 1936, s. 30.
85 *Supra.*
86 [1906] 1 K.B. 648.
87 *Per* Upjohn J. [1954] Ch. at p. 475.

numerous. There is the special problem of the plaintiff who suffers flooding back through a sewer connected with an overloaded system; his complaint may be regarded as a demand for better service,[88] though it would be just as reasonable to regard him as exposed by social compulsion to an unusual danger. There is the dispute as to whether statutory authorities are subject to the rule in *Rylands* v. *Fletcher*,[89] and whether their liability for nuisance, as occupiers or under express statutory provision, is confined to nuisance negligently caused, and what is the meaning of "negligence" in this connection.[90]

In these cases, too, explicit reference to policy has been frequent.[91] The governing consideration expressed in *Glossop* and in *Robinson* was that drainage authorities should not have their hands forced by private actions, since they had to exercise a discretion to use limited means for the benefit of large numbers. This feature was particularly prominent in the 1870–1900 period, when modern drainage was being introduced on a large scale and the competing demands on local authorities were numerous. If the courts had been too ready to intervene on behalf of individuals, their action could have been regarded as an attempt to usurp the functions of local authorities, or to substitute judicial for administrative discretion. Evidently the Derby Council resented the *Pride of Derby* litigation in 1952 on some such ground[92]; that and other recent cases occurred when war damage and emergency controls over materials and labour had created new problems of competing demands for relief from accumulated nuisances. If the *Pride of Derby* court seemed less sympathetic than the *Glossop* court to the problems of local authorities in its discussion of principle, it showed its understanding of the administrative problem by deferring the issuing of an injunction; the latter device is a frequent instrument of judicial adaptation to administrative policy needs, and a retort to the recommendation of the Royal Commission on Fever Hospitals in 1882 that the power of the courts to issue injunctions should be curtailed.[93] The policy

[88] *Stretton's Derby Brewery* v. *Derby* [1894] 1 Ch. 431, and *per* Evershed M.R. [1953] Ch. at p. 177, dealing with *Robinson* v. *Workington*.

[89] *Cf.* Vaisey J. in [1945] 2 All E.R. at p. 664 with Denning L.J. in [1953] Ch. at p. 189 and Upjohn J. in [1954] Ch. at pp. 465 *et seq.*

[90] See *per* Upjohn J. in [1954] Ch. at p. 477. There has been a tendency to turn the question of negligence in such cases into one of law; if the technical means for avoiding the danger are shown to exist and to be practicable (within the meaning of Lord Dunedin's dictum in the *Farnworth Case* [1930] A.C. at p. 183), then failure to employ them is presumed to be negligent. This special sense of negligence is discussed by McDonald J. of the Supreme Court of Nova Scotia in *J. R. Porter Co. Ltd.* v. *Bell* [1955] 1 D.L.R. 62, and its application is illustrated by *Fullarton* v. *N. M. Electric, etc., Co.* (1916) 21 C.L.R. 181 (H.C. of Austr.).

[91] *Glossop* at p. 109, *Dorking* at pp. 606–7, *Robinson* v. *Workington* at p. 622.

[92] See *per* Evershed M.R. [1953] Ch. at p. 162.

[93] The recommendation was the result of medical indignation at the closing of smallpox hospitals under the decision in *Metropolitan Asylums* v. *Hill* (1881) 6 A.C. 193. Although the latter decision is often quoted with respect, its

problems in drainage cases are usually more considerable than with road problems, since the trouble can frequently be cured only by the heavy expense of new pipes and plants, whereas to mend the hole in the road or the collapsed culvert is comparatively cheap and easy. Hence it is not surprising that a special drainage non-feasance doctrine, however small in extent, has survived; the wonder is that special doctrines in this field have not proved more numerous. Such as it is, the *Robinson–Hesketh* rule undoubtedly gives drainage authorities a little more protection than would the basic non-feasance rules, because the plaintiffs (notwithstanding dicta to the contrary) are usually complaining about something a good deal more substantial than "inadequate amelioration," as a reference to the facts of *Hesketh* v. *Birmingham* and *Smeaton* v. *Ilford* will show.

Conclusion

The conception of non-feasance in administrative law arose partly from logical considerations connected with the analysis of legal liability, partly from considerations of policy, and partly from the way in which legal problems came before the courts at particular historical periods. Between 1875 and 1900 there was a judicial tendency to seek for a common conception of non-feasance applicable to all types of public statutory authorities, and going beyond the necessities of a doctrine which merely denied a "right" of individuals to advantageous public services. But since 1900 the attempt to construct a general doctrine has been abandoned and the tendency has been instead to expand the liability of public authorities. But a specific dogmatic rule has remained giving a special immunity to road authorities, and another of narrower scope giving a special immunity to drainage authorities; it is a question of convenience of language whether the term "non-feasance" should be retained in both contexts, but the danger of confusion is sufficiently great to justify the abandonment of the word in relation to the drainage immunity and to speak instead of "the rule in *Hesketh* v. *Birmingham*" or some such expression.

The policy considerations which originally justified these special rules of administrative law have not disappeared. Their significance, however, varies greatly from place to place in the several jurisdictions where they apply. A defence which makes good sense when applied for the benefit of a poorly endowed road authority responsible for a few thousand square miles in the Western Division of New South Wales, in a suit by a wool-millionaire who breaks the springs of his Rolls-Royce in a pot-hole, makes less sense when applied to save an inner-suburban London road

reasoning is open to criticism and it may be doubted whether it has ever actually been applied. See the comment of Higginbotham C.J. of Victoria in *McDonald* v. *Coburg* (1887) 13 V.L.R. at p. 282.

authority in suit by a Joe Doakes who breaks an ankle over a fire-plug exposed by road subsidence.[94] The concepts available to the courts are not adequate to provide satisfactory adjustment to such variations. In the *Pride of Derby* case a sporting interest found protection; in *Smeaton* v. *Ilford* a domestic interest failed to do so. In this situation, it seems that policy as well as *elegantia juris* will be best served if the courts whittle away the immunity doctrines as fast as the concepts permit, so forcing the legislatures to provide more detailed and appropriate protections where necessary, using the Canadian legislation as a model.

GEOFFREY SAWER.*

[94] *Cf. Moore* v. *Lambeth Waterworks*, 17 Q.B.D. 462. In *Quinn* v. *Minister of Commerce* [1954] N.I. 131 Lord MacDermott, enrolling himself among those who consider the "special immunities" as anachronisms, suggested that at least well-endowed central bodies responsible for trunk highways should be placed under a stricter liability for non-repair.

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THE CRICHEL DOWN AFFAIR

This horse has not lacked flogging. The excuses for a further article are that most of the accounts have been primarily commentaries on a text assumed to be known and that the animal has acquired the wings and myths of a Pegasus. I have tried in the first Part to summarise the facts and to separate them from comment. This was not easy, especially as I felt obliged, after considering other alternatives, to restrict myself to the material published in the reports [1] of the Inquiry and the Committee, and to Hansard.[2] The second Part contains some of the reactions, principally expressed in Parliament, to these facts, and the third Part a few personal reflections.

I

There were principally four administrative groups concerned in the affair. The first group consisted of the Ministry of Agriculture and Fisheries including the Minister (Sir Thomas Dugdale), the Parliamentary Secretaries (Mr. Nugent and Lord Carrington), an Under-Secretary (Mr. Wilcox) and an Assistant Secretary (Mr. Payne). The second group consisted of the Agricultural Land Commission including the Chairman (Sir Frederick Burrows), two members (Mr. Bourke and Mr. Watson-Jones), the Chief Technical Officer and Land Agent (Mr. Edwards), the Secretary (Mr. Smith) and officers of the Lands Service being the Provincial Chief Officer (Mr. Hole), the Provincial Land Commissioners (Col. Norton-Fagge, succeeded by Mr. Lofthouse, succeeded by Mr. Middleton) and a subordinate officer (Mr. Brown). The third group consisted of the Crown Lands Commission, including the Permanent Commissioner (Mr. Eastwood), and a firm of estate agents acting as Crown Receivers (Sanctuary and Son, of which Mr. Thomson was a partner). Finally the Dorset Agricultural Executive Committee had as its County Agricultural Officer, Mr. Ferris.

About 1937, the 725 acres of Crichel Down were compulsorily acquired for £12,106 by the Air Ministry as a bombing range. In 1949, the Air Ministry having ceased to use the land, it was decided to transfer it to the Ministry of Agriculture and Fisheries which assumed control in fact (though the requisite order under the Agriculture Act, 1947, was never made) in January, 1950.

[1] Public Inquiry ordered by the Minister of Agriculture to be held by Sir Andrew Clark into the disposal of land at Crichel Down (Cmd. 9176). Report of a Committee appointed by the Prime Minister to consider whether certain civil servants should be transferred to other duties (Cmd. 9220).

[2] The debate was held on July 20, 1954 (530 H.C.Deb. 5s. cols. 1182–1302).

Management was handed over by that Ministry to the Agricultural Land Commission which operated, in its turn, through the Lands Service which, in their turn, carried out their executive functions in this instance through the Dorset Agricultural Executive Committee.

The story opens with a discussion of what was to be done with the land. In December, 1949, Col. Norton-Fagge consulted the County Agricultural Officer and in May, 1950, inspected the land with Mr. Hole (his immediate superior). Before May, the agent for the Crichel Estate (which owned adjoining land and from which about half of Crichel Down had been acquired) wrote to the Ministry asking for an opportunity to negotiate for Crichel Down if it should be for sale. To this Col. Norton-Fagge replied that no definite reply could then be given. Mr. Hole reported to the Land Commission that (1) the land could be let in blocks to neighbouring farmers or (2) the land could be divided into two or more independent fully equipped holdings or (3) a single fully equipped holding could be formed. He recommended the third course, and was supported by Mr. Bourke (a member of the Land Commission) who visited Crichel Down on August 11, 1950. On August 20, the Land Commission formally approved this third course. So ends the first chapter.

A few weeks later, farmers began to apply for consideration as tenants. They included a Mr. Tozer, and were all answered to the effect that their names would be recorded, that they would later be sent particulars and that advertisements inviting tenders would appear in the Press. On August 28, 1951, Mr. Lofthouse (successor to Col. Norton-Fagge) wrote to Mr. Hole asking for authority to invite tenders but a decision was deferred. Two months later, members and officers of the Land Commission inspected Crichel Down, accompanied by Mr. Ferris, Mr. Hole, Mr. Lofthouse and others. It was decided that the tenancy should be offered for tender in Michaelmas, 1952. In May, 1952, one of the applicant farmers (Mr. Taylor) offered to rent Crichel Down unequipped at £3 per acre; the Land Commission had anticipated letting at £2 per acre, after spending £20,000 on re-equipment. Mr. Lofthouse forwarded this to Mr. Hole with a covering letter recommending that the original plan be adhered to and Mr. Hole sent it on to the Land Commission with a strong covering letter to the same effect. On June 20, the Land Commission confirmed that they were not prepared to let the land without equipment. At much the same time the agent to the Crichel Estate asked if part of the land could be bought. It was stated in evidence that this proposal was not pursued as it was thought the Ministry had no power to sell land. Later the Law Officers gave their opinion that this view was mistaken. On June 10, the Secretary to the Land Commission replied to the agent that Crichel Down was to be let as an equipped unit and that invitations to tender would be advertised.

At this point Lieut.-Commander Marten (whose wife had succeeded to the Crichel Estate on the death of her father, Lord Alington) wrote to his M.P. (Mr. Crouch) saying, amongst other things, that the land had been compulsorily acquired. On June 13, Mr. Crouch sent this letter on to Mr. Nugent (the Parliamentary Secretary in the Commons) who asked the Land Commission to report on the desirability of selling this part of the land back to the Crichel Estate; and Lieut.-Commander Marten's letter was sent to the Secretary of that Commission. The responsibility for compiling this report was passed down the line from that Secretary to Mr. Hole and then to Mr. Lofthouse. But Mr. Lofthouse was about to go on leave and he handed the matter to Mr. Brown, whom Sir Andrew Clark describes as " a young and comparatively inexperienced subordinate."

To pause at this point: it will be clear that the recommendation to equip and let Crichel Down and not to sell or let it unequipped was made first by Col. Norton-Fagge and Mr. Hole, subsequently supported by Mr. Bourke and adopted by the Land Commission on August 20, 1950. This was confirmed by that Commission in June, 1952. Inspections had been made by various persons at various times. The effect of Mr. Nugent's instructions was to reopen the whole question. The report asked for by the Parliamentary Secretary was obviously of considerable importance. The Secretary of the Commission, Mr. Hole and Mr. Lofthouse each in turn enjoined on Mr. Hole, Mr. Lofthouse and Mr. Brown respectively, the need to avoid approaching " the people concerned," " the various owners " or " anyone else connected with the land." Mr. Brown was limited to " the office organisation " and Mr. Ferris. He was told that " the job was extremely confidential," and had, in his own words, " to work completely in the dark."

On August 7, 1952, Mr. Brown sent his report to Mr. Hole, with a copy to Mr. Lofthouse. Among the inaccuracies in this report were the statements that two of the areas in Crichel Down were acquired voluntarily by agreement, and that farm buildings on adjoining land were inadequate. On August 13, Mr. Watson-Jones (a member of the Land Commission who had inspected Crichel Down ten days previously with Mr. Ferris) reported to the Commission that to sell back the part of Crichel Down originally owned by the Crichel Estate would seriously interfere with existing plans to farm Crichel Down. On the same day, Mr. Hole sent Mr. Brown's report to the Land Commission with a covering letter in which he said that although the proposal to create one fully equipped farm was most attractive the high cost made him wonder whether the project should be undertaken. Apparently this letter was not passed on to the Ministry with Mr. Brown's report.

When the Land Commission forwarded Mr. Brown's report to the Ministry they gave as their view that the alternatives were to keep the whole of Crichel Down or sell it all back to the previous

owners. The two particular inaccuracies in Mr. Brown's report mentioned above were, with others, repeated in the Land Commission's letter to the Ministry. This letter was sent over the signature of Mr. Smith, the Secretary, and contained a statement (which appears to have been Mr. Smith's personal view and not that of the Commission) that the equipping of the land as one unit would be " a satisfactory proposition from the financial point of view."

A further report followed in November, 1952, made to the Minister direct by Lord Carrington (Parliamentary Secretary in the Lords). He inspected the land with Mr. Ferris, did not visit adjoining owners and accepted Mr. Brown's report as factually accurate. He recommended that Crichel Down should be farmed as a single unit. Mr. Wilcox (an Under-Secretary in the Ministry) asked Mr. Hole whether, if the land were sold as a single unit, it would be better to equip it first or not. Mr. Hole then valued the bare land at £20,000, and suggested that after equipping at a cost of £22,500 it might realise £41,000 with vacant possession or £31,000 with a sitting tenant paying £2 3s. 6d. per acre.

At this point, with the whole question being considered at the highest level within the Ministry, the second chapter may be closed. The third chapter opens with what, were the story fiction, would be the daring device of introducing major characters late in the plot's development. These were the Crown Lands Commissioners, who had money to invest, and Mr. Wilcox suggested to the Permanent Commissioner (Mr. Eastwood) that they might buy Crichel Down as bare land, unequipped. In January, 1953, Mr. Eastwood inspected Crichel Down accompanied by an employee of a firm of estate agents called Sanctuary and Son who acted as Crown Receivers for the Commissioners. On February 3, Mr. Thomson (a partner in Sanctuary and Son) wrote to Mr. Eastwood with a scheme for equipping Crichel Down at a cost of £40,000 and assuming that the land would be bought for £15,000. On February 16, a meeting at the Ministry between Mr. Wilcox, Mr. Eastwood, Mr. Hole, Mr. Thomson and others decided on the figure of £32,000 for re-equipping but that nothing could be done by Crown Lands until the rent which a tenant would pay could be ascertained. Mr. Hole did not mention that there had been a promise of public tender. It was after this meeting that Mr. Thomson told Mr. Eastwood that he had a possible tenant in mind, called Mr. Tozer.

On the day after this meeting, Sir Frederick Burrows saw the Minister and agreed to his suggestion to sell Crichel Down unequipped to Crown Lands. Two days later Mr. Eastwood told Mr. Thomson to start looking for a suitable tenant but not to make definite arrangements until Mr. Eastwood had approved. Mr. Thomson at once telephoned Mr. Tozer who, on February 27, said he would like to go forward with the proposition that he should

rent the land at £3 per acre after it had been equipped. It was at this point (the actual date was March 11) that the promise about public tenders was discovered by Mr. Middleton who had succeeded Mr. Lofthouse as Land Commissioner in the Lands Service. Mr. Middleton pointed out the possibility of a breach of faith to Mr. Hole who suggested that he send the list of applicants to Mr. Thomson for consideration. This was done and Mr. Thomson replied that he would pass the letter on to Crown Lands but that if Crown Lands did buy there was no doubt that Mr. Tozer would become the tenant. In forwarding the letter to Crown Lands, Sanctuary and Son stated that it was rather late in the day for this information about other applicants to be given them.

On March 23, Mr. Eastwood for Crown Lands replied to Mr. Thomson saying that he appreciated that Mr. Thomson had gone too far with Mr. Tozer but that the particulars of the applicants should be obtained so that "we can then decide, in conjunction with the Ministry of Agriculture, what if anything we need to do, at least to appear to implement the promises made to them." Mr. Eastwood sent a copy of this letter to Mr. Wilcox who replied on March 25 that he was very glad that Mr. Eastwood had asked for a list of applicants "so that he can consider whether there is anything that could be done with a view at any rate to appear to be implementing any past promises." This was written without consulting any higher authority. On March 27, Lieut.-Commander Marten saw Mr. Nugent and asked to be allowed to become the tenant of the whole of Crichel Down and farm it from his existing holding. At this time Mr. Nugent did not know that Crown Lands considered themselves committed to Mr. Tozer, as Mr. Wilcox had not told him. Later Mr. Nugent wrote to Lieut.-Commander Marten's M.P. (Mr. Crouch) that the sale to Crown Lands was the right course and that it was too late to go back on it. On May 5 the Minister, as a result of a letter from Lieut.-Commander Marten to him, had a private meeting with some M.P.s including Mr. Crouch.

On May 14, Mr. Eastwood wrote to the Treasury for approval to buy Crichel Down at £15,000 and to spend up to £34,000 on equipping it. He said that a suitable tenant had been found. After some demur, this was agreed. A dispute then arose whether Mr. Tozer was to be entitled to any claim for dilapidations in respect of overcropping and foul land. Sanctuary and Son argued for Mr. Tozer and eventually the claim was allowed.

On July 24, Mr. Nugent's Private Secretary wrote to Mr. Crouch: "It is true that the Crown Lands Commissioners are proposing to let Crichel Down to Mr. Tozer, though the negotiations have not yet been completed." Lieut.-Commander Marten wrote to Mr. Eastwood that this news came as a considerable shock to him. This letter was sent to Mr. Thomson for advice. Mr. Thomson replied to Crown Lands that from the correspondence

alone "Commander Marten was the last person we should want as a tenant"; that Commander Marten would do all he could to embarrass Crown Lands and Mr. Tozer; and that Crown Lands could certainly not have him as a tenant "after the way he has behaved." Later Mr. Wilcox wrote in the same strain to Mr. Eastwood that Lieut.-Commander Marten would continue to make a nuisance of himself so long as he thought the decision might be changed. After a meeting at the Ministry on September 4 at which Lieut.-Commander Marten was present, Mr. Tozer was given an opportunity to withdraw which he did not accept.

On September 8, Mr. Wilcox wrote to Mr. Hole asking if he could throw any light on the circumstances in which Lieut.-Commander Marten was able to get a licence for building farm cottages in 1950, apparently in the hope that he would be able to farm Crichel Down later. This letter created the impression that Lieut.-Commander Marten had said that he built the cottages for this purpose. He had not said so and there was no evidence that this was his purpose.

On September 11, Mr. Tozer became the tenant. On September 20, Mr. Trumper (Liaison Officer at Exeter to the Ministry) wrote a letter to the Ministry commencing "Herewith a long tale of woe from one Commander Marten." On September 28, a petition was sent to the Minister asking for a public inquiry and after an interview and further correspondence the Minister directed the inquiry to be held.

On November 6, the Minister appointed Sir Andrew Clark Q.C. to hold the inquiry with the following terms of reference: "To inquire into the procedure adopted (a) in reaching the decision that land at Crichel Down should be sold to the Commissioners of Crown Lands; (b) in the selection of a tenant by them; and the circumstances in which those decisions were made, but excluding from the inquiry all questions of governmental policy and, in particular, any question of whether preferential treatment should have been given to any applicant on the ground of his previous ownership or occupation of the land." The report of the inquiry is dated May 13, 1954.

Subsequently the Prime Minister appointed a Committee to consider whether, in order to maintain public confidence in the administration of Departments, any of the officers whose conduct was called in question in Sir Andrew Clark's report should be transferred from their existing duties to other posts. The Committee recommended that Mr. Eastwood should be transferred; but that no action was called for in the cases of Mr. Wilcox, Mr. Smith, Mr. Hole or Mr. Lofthouse. Mr. Wilcox had been transferred on May 1, 1954, to a different post. Mr. Lofthouse had in December, 1952, been promoted and transferred to the headquarters of the Ministry in London. The Committee reported on July 14, 1954.

Between the date of the report of the inquiry and that of the

Prime Minister's Committee, the question was again raised in Parliament. On June 15,[3] the Minister (Sir Thomas Dugdale) made a statement on the report which had been published that day. He drew attention to Sir Andrew Clark's finding that there had been no bribery, corruption or personal dishonesty and added: "The inquiry has thus achieved my main purpose which was to deal with any rumours and suggestions of this kind." He continued that having heard the observations of those who were criticised: "I must in fairness say that I have formed a less unfavourable view of many of the actions taken by those concerned than appears in the report." Further questions were asked on June 24.[4]

On July 20,[5] the House of Commons in a full debate on the adjournment considered the report. Sir Thomas Dugdale outlined the facts. He then explained that he had not intended on June 15 to suggest that faults which fell short of corruption were unimportant. For these faults of his officers he accepted responsibility. He referred to the finding of the Prime Minister's Committee, announced the intention to investigate the organisation of the bodies concerned and declared the Government's policy on compulsorily acquired land. Finally, he announced that he had resigned.

II

The strength of the reaction in Parliament and outside as this story developed and became known had many causes. Antagonism to governmental control, sympathy with the struggle of one citizen against a machine, the conflict of party policies, suspicions of major scandals, all with more or less justification (according to preconceptions) combined to arouse interest. One Member of Parliament, indeed, explained the whole attack on the civil service in terms of social psychology and the decline in the power of the middle class who sought to avoid self-criticism by attaching blame elsewhere.[6] Of these various cross-purposes, one must be isolated at once and set aside: that is, the policy issue. The major question here was the Government's agricultural policy and, in particular, what should be done in the future where land, acquired by a Department, ceased to be used for its original object. The Government declared that, subject to certain exceptions, such land should be sold and first offered to its former owner or certain successors in title at the current market price. The merits or demerits of this declaration are not apt to be considered in a legal periodical.

In one of his best-known stories, Mr. James Thurber describes the scene where a large, complex and normally silent machine

[3] 528 H.C.Deb. 5s. cols. 1745–7.
[4] 529 H.C.Deb. 5s. cols. 576–80.
[5] 530 H.C.Deb. 5s. cols. 1182–302
[6] Sir R. Acland (530 H.C.Deb. 5s. cols. 1231–4).

suddenly begins to go "pocketa—pocketa—queep—pocketa—queep." From time to time some part of the machinery of government is similarly afflicted. Lord Hewart once thought he detected some such disturbance; the Lynskey Tribunal revealed certain peculiarities. The Crichel Down affair similarly caused political mechanics at least to scratch their heads.

One M.P. thought that the trouble sprang "more from an excess of zeal than from any real wrongdoing." [7] This in its turn is only a part of the problem. Had these actions and attitudes been revealed in the attempts by a private person to further his own plans, they would not have been regarded as exceptional. Here the difference was that public servants were seeking to pursue a decision and were being challenged by a member of the public who was seeking not merely to defeat their plans but also to reverse the decision itself. Where they failed was in their refusal to consider how far his protestations were justifiable not merely in his own but also in the public interest. Lieut.-Commander Marten was not, it would seem, an adversary who was likely to promote that more objective examination. In the debate in the House, Mr. George Brown M.P. referred to a public speech delivered by Commander Marten which he says was in a document or file which went to Sir Andrew Clark. In this speech Commander Marten said of the Parliamentary Secretary in the Commons, as quoted by Mr. Brown: "I thought to myself 'you smooth creature, you're so slippery, you'd slide through the kitchen keyhole.'" Mr. Brown commented: "That is Commander Marten referring to the Joint Parliamentary Secretary who, at every stage, as far as I could see, had done his best to see that Commander Marten had no grounds for complaint." [8] The difficulty is this. Commander Marten might well retort that only by vigorous words and vigorous action could he hope to create the sort of atmosphere in which an inquiry would be made. If he were right in this contention, then the fault lies with the officials. But it must be remembered that the policy not to sell Crichel Down had been decided. It was not therefore to be expected that this decision would be reviewed because of particular objections. But what was to be expected was that the officials would be scrupulously fair in the way they implemented that policy. And in this they were not successful. The Prime Minister's Committee reported: "In present times the interests of the private citizen are affected to a great extent by the actions of civil servants. It is the more necessary that the civil servant should bear constantly in mind that the citizen has a right to expect, not only that his affairs will be dealt with effectively and expeditiously, but also that his personal

[7] Mr. S. N. Evans (*ibid.*, col. 1252).
[8] *Ibid.*, col. 1213.

feelings, no less than his rights as an individual, will be sympathetically and fairly considered." [9]

In part, the Ministerial position is clear. Sir Thomas Dugdale himself made clear that the decision of the Agricultural Land Commission to farm Crichel Down as a unit was taken on agricultural grounds and the Minister in 1952, after the inspection and report by Lord Carrington, confirmed this. Sir Andrew Clark found that although the decision, "from a purely financial point of view," was unsound, "there was a sharp divergence of expert opinion as to whether this method of dealing with the land would result in increased production, but there were undoubtedly ample grounds for coming to the conclusion that it would do so." Similarly, the Minister approved the sale to Crown Lands, and again Sir Andrew Clark agreed that this was "certainly the best, and probably the only certain way of ensuring that the purchaser implemented the Government policy." It is more difficult to try, from the outside, to assess the extent, if any, to which Ministerial shortcomings were to blame. No one doubts that Ministers must rely on the memoranda of their civil servants. Yet they have a corrective function also and should be alert to detect inadequate, unexplained or incomplete reports. It would be unfair to try to make clever deductions from the facts we know. The Minister and his Parliamentary Secretaries may have been less acute than they should have been. It is simplest to leave Sir Thomas Dugdale with the last word: "The accusation has been made publicly that officials wilfully misled me. Although there were certain inaccuracies and deficiencies in the information given me, when I took my decision, I had the main facts before me, and my advisers were certainly not guilty of wilfully misleading me. I underline the word 'wilfully'." [10]

The steps taken by the Government to investigate the complaints made by Lieut.-Commander Marten and others caused comment. It was alleged that the public inquiry was an unsatisfactory method and that Sir Andrew Clark was an unfortunate choice. Mr. George Brown, speaking for the Opposition in the debate of July 20, 1954, would, it seems, have preferred the investigation to have been conducted under the Tribunals of Inquiry (Evidence) Act, 1921, in view of the protection given to witnesses under that Act. Sir David Maxwell Fyfe for the Government denied that the procedure used prevented a frank and free statement of opinion. The inquiry was ordered by the Minister and the report was made to him. Another Opposition member (Mr. R. T. Paget) criticised the Minister for ordering an inquiry to be held by someone outside the Ministry as an abdication of responsibility. Most of the criticism from Opposition

[9] Cmd. 9220, para. 3.
[10] 530 H.C.Deb. 5s. cols. 1190–1.

members was reserved for the appointment of Sir Andrew Clark and for his report. Sir Richard Acland drew attention to the fact that Sir Andrew had been a Conservative candidate who had attacked nationalisation as "the slippery slope to slavery," and also alleged that the report, while being severe on civil servants, was much less critical of Lord Carrington as a "Tory Minister." Sir Richard stated: "If Sir Andrew Clark will come into a public place where I may ask him questions, and will there answer the questions which I will ask him, I will then repeat verbally or in writing that I charge him that, in making this report, either he was inhibited by his political preconceptions, or he was not competent." [11] Mr. Clement Davies referred to Sir Andrew Clark as "a very respected Member of the Bar, having the confidence of his colleagues who have experience of him which [Sir Richard Acland] has not." [12] Mr. George Brown said: "I regard this as a very partial report, full of partiality from the beginning, very prejudiced and very argumentative where it is supposed to be factual, and inaccurate." [13]

The appointment of the Prime Minister's Committee was also criticised by Mr. Paget on the ground that it was the Minister's duty to discipline his civil servants and by Mr. Herbert Morrison who questioned whether it was right that two of its three members should be former Permanent Secretaries.

Constitutionally, one of the most important questions raised was that of Ministerial responsibility. The principal contributions in the debate were from Sir Thomas Dugdale, Mr. Paget, Mr. Herbert Morrison and Sir David Maxwell Fyfe. Sir Thomas Dugdale stated the classic doctrine of the full responsibility of Ministers for their officials but, he said, "it should not be thought that this means that I am bound to endorse the actions of officials, whatever they may be, or that I or any other Minister must shield those who make errors against proper consequences." [14] Mr. Paget suggested that Ministerial responsibility had two principles. First, the civil servant must be able to trust his Minister, that only his Minister may punish him. Secondly, the public must know that the Minister will be ruthless with his servants if they go wrong. Mr. Morrison went a little more deeply into the constitutional relationship between a Minister and his officials. "It may be right, in exceptional circumstances," he said, "for the Minister publicly to criticise his civil servants." [15] He continued that normally mistakes are best dealt with inside the Department. Frank, open and honest reports from civil servants to their Ministers about persons outside must not be discouraged. Finally,

[11] *Ibid.*, col. 1229.
[12] *Ibid.*, col. 1243.
[13] *Ibid.*, col. 1209.
[14] *Ibid.*, col. 1190.
[15] *Ibid.*, col. 1279.

Sir David Maxwell Fyfe suggested four different sets of circumstances. First, a Minister may explicitly order a civil servant to take certain action or, secondly, the civil servant may act properly in accordance with the policy laid down by the Minister. In both these cases, the Minister must protect and defend him. Thirdly, "where an official makes a mistake or causes some delay, but not on an important issue of policy and not where a claim to individual rights is seriously involved, the Minister acknowledges the mistake and accepts the responsibility, although he is not personally involved." In this case the "corrective action" is taken in the Department and the official is not exposed to public criticism. But fourthly, "where action has been taken by a civil servant of which the Minister disapproves and has no prior knowledge, and the conduct of the official is reprehensible, then there is no obligation on the part of the Minister to endorse what he believes to be wrong, or to defend what are clearly shown to be errors of his officers" although he remains constitutionally responsible to Parliament.[16]

A different aspect of Ministerial responsibility to Parliament was raised by Opposition members who alleged that there had been undue back-bench and political pressure on the Government and statutory bodies. Mr. George Brown advanced this contention which was denied by Mr. Walter Elliott and Mr. Crouch. Mr. Herbert Morrison declared roundly: "This is a victory for the boys upstairs. This is a victory for the 1922 Committee"[17] and instanced other examples such as commercial television and members' pay.

There seems to be general agreement that there were defects in organisation. The Prime Minister's Committee recorded their "strong impression that some part of the deficiencies disclosed in the handling of this case may have been due as much to the organisational relationship between the headquarters of the Ministry of Agriculture and Fisheries, the Agricultural Land Commission and the Agricultural Land Service as to the faults of individuals."[18] The responsible Minister announced that there would be independent investigations into the methods of administering Crown Lands, and the organisation and methods adopted within the Ministry by the Land Commission and the Land Service for dealing with transactions in agricultural land. It is also generally agreed that there were "faults of individuals." The rumours of bribery, corruption and personal dishonesty which seem to have persuaded the Minister to hold the inquiry were found by Sir Andrew Clark to be without substance. But certain incidents showed that the civil service can sometimes fail to maintain its high standards. Thus the Commissioners of Crown Lands

[16] *Ibid.*, col. 1290.
[17] *Ibid.*, col. 1287.
[18] Cmd. 9220, para. 9.

were not informed of the promise to invite tenders until, in their opinion (which Sir Andrew concluded to be "wholly unjustified"), they were committed to Mr. Tozer as tenant. When this was known, both Mr. Eastwood and Mr. Wilcox thought it might be necessary to consider whether something should be done to appear to be implementing past promises. Mr. Wilcox's inquiry into Lieut.-Commander Marten's licences for building cottages is described by Sir Andrew Clark as "a regrettable lapse." Mr. Trumper, Liaison Officer to the Minister at Exeter, wrote a letter to the Ministry commencing "Herewith a long tale of woe from one Commander Marten." Sir Andrew Clark decided that the omission by the Land Commission to supply the Ministry with a copy of Mr. Hole's letter of August 13, 1952, in which he expressed doubts of the financial soundness of the scheme, was deliberate; that "Mr. Wilcox was guilty of a grave error of judgment in taking upon himself to tell Crown Lands that they would not be expected to implement any promises the Lands Service had made"; and that "Mr. Tozer should never have been allowed to claim dilapidations in the circumstances of this case, and I can find no reason why Mr. Thomson should have pressed the claim so energetically on his behalf or why it was ultimately allowed."

Sir Andrew Clark's interpretation of incidents like these is clear. Of the restrictions placed on Mr. Brown's investigations he said that there was no improper motive and they arose "solely from the passionate love of secrecy inherent in so many minor officials." Of the attitude adopted by Mr. Thomson and Mr. Eastwood that they were early committed to Mr. Tozer, Sir Andrew writes that this was "dictated solely by a determination not to allow anything to interfere with the plans they had in mind." Again Sir Andrew found that this was "a most regrettable attitude of hostility to Lieut.-Commander Marten" who "acted perfectly properly throughout. . . . This attitude was engendered solely by a feeling of irritation that any member of the public should have the temerity to oppose or even question the acts or decisions of officials of a Government or State Department." Perhaps Sir Andrew over-simplified the motives of some of those concerned. He seems fond of the word "solely." No one would seek to excuse some of these actions and attitudes but the shortcomings of men having authority sometimes have complex origins.

III

What is the moral of this highly moral story? First, perhaps, that the introduction of one simple and familiar device would have avoided most of the difficulty. Here was a parcel of land in which many were interested, concerning which local knowledge was

valuable, and which could be dealt with in different ways. Had there been a public local inquiry in the spring of 1950 for the better information of the Minister, he would not have had to institute a public inquiry four years later. Is it to be too wise after the event to say that the officials might have seen that the situation in 1950 had its explosive possibilities, especially if they acted secretively? I have already quoted Thurber. A drawing of his shows a man, crouching on a sofa and saying to a girl who is perched on a stool and who has just permitted her soul to touch the ground for a moment: "What do you want to be inscrutable *for*, Marcia?" What do officials want to be inscrutable *for*?

The essential problem remains. For the fundamental defect revealed was not a failure in the constitutional relations of those involved nor the policy decisions nor even the length of the struggle which Lieut.-Commander Marten had to wage. It was in the method and therefore in the mental processes of the officials. Anyone who has had dealings with central or local departments knows the great and natural difficulties which can arise when he wishes to try to convince the official mind of the unwisdom of some action which has been more or less decided upon. Sometimes the complainant may meet with great courtesy, understanding and a willingness to receive new points of view. Sometimes he feels that his argument is being weighed against other criteria and a reasoned decision made which is based on all the relevant considerations. In this case the complainant, where he is nevertheless unsuccessful, may feel that though he believes the decision to be wrong, yet it is an understandable decision fairly arrived at. But sometimes other impressions are left. Decisions seem to have been arrived at which are based on prejudice, on half-truths, on personal animosity to him who has "made a fuss," "been a nuisance" or "stirred up trouble." How could the recipient of the letter from the Ministry's Liaison Officer at Exeter beginning "Herewith a long tale of woe from one Commander Marten" fail to be prejudiced against the complaint? Is there not something frightening about an official attitude of mind which seeks to cover an administrative blunder by contemplating action which will be a sham but which will "appear to implement" forgotten promises? The Crichel Down affair was exceptional. But the attitude of mind is not uncommonly encountered. It is an attitude which is shaped by the consciousness of power. The geography of the State is on a large scale and small men can move mountains.

So seen, the problem of Crichel Down is neither new nor simple. Nothing can be gained by inveighing against administrative powers as such or against the regulatory State. Judicial and political control only scratches the surface. The defect derives from the fact that though a machine can be made to perform perfectly a difficult, if limited, function, a human being, if less limited, is

more fallible. There was a lack of a sense of public responsibility shown on occasions in this story. In the end we must rely on that personal integrity which is so much more than an absence of corruption.

All of this may seem somewhat vague and high-sounding. But the peculiar virtue of the civil service has been its objectivity and the feeling it has created that its decisions are based on accurate information, intelligent interpretation and a responsible attitude of mind. The criticism has hitherto been that administration has been too formalised and that the careful exclusion of personal considerations in the making of decisions has resulted in over-caution, "red tape" and a certain inhumanity. In Crichel Down, it was the presumed virtue that was found to be lacking. What was needed was more "red tape" not less. The civil service must find its own solution. Whether some new institution, perhaps an internal tribunal, would help is doubtful. For some reason, the standards established by the great majority of those in high official authority do not, it seems, permeate the whole of the service. It is for those responsible to find out why this is so and to ensure that objectivity and intellectual integrity become not only common but, so far as is humanly possible, universal habits of mind.

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JUDICIAL REVIEW OF LEGISLATIVE POLICY

A NUMBER of lawyers are at present pressing for a considerable extension of judicial review of the decisions of tribunals and of Ministers. In order to show the need for this extension certain instances have been taken which are supposed to show that if there had been machinery for judicial review an injustice would have been prevented. The three instances with which this note is concerned have been taken by the Rt. Hon. Lord Justice Denning [1] and by a group of conservative lawyers in a booklet *Rule of Law* published in March, 1955.

The first instance is *Woollett's* case.[2] In that case the decision of an Agricultural Land Tribunal upholding a proposal of the Minister to acquire some requisitioned land had been attacked on the ground that the tribunal had not been properly constituted. The Court of Appeal found that the defect, if there had been one, had been cured and that the tribunal was properly constituted. There were, however, two features about the proceedings before the tribunal that were mentioned in the law courts and that have been brought into prominence again. The first is the statement that "the appeals—all twenty-four of them—were heard in a single day."[3] That statement is presumably intended to suggest that the cases were taken so quickly that they could not have been investigated adequately. All the twenty-four cases arose from similar circumstances, being the splitting up of what had been one agricultural unit into a number of plots with different ownerships. The cases were heard together because that was the wish of the professional representatives who appeared on behalf of the various owners. These representatives included counsel and solicitors. The case lasted for one day for the simple reason that the evidence produced and the addresses to the tribunal did not take any longer. The tribunal sits to hear whatever evidence and and representations may be put before it, and it is not responsible, any more than a common law judge is responsible, for deciding how the parties shall present their case. No lawyer engaged in these cases has suggested that they were dealt with in a hurried way or that there was any unusual feature in the hearing. The

[1] A lecture delivered in December, 1954, printed in 33 *Public Administration* (1955), p. 1.

[2] [1954] 1 W.L.R. 1149; [1955] 1 Q.B. 103. I commented on this case in 18 *Modern Law Review*, p. 165.

[3] *Rule of Law*, p. 18.

tribunal also inspected the land, that taking place on a subsequent day. Attacks upon the merits of the decision have no foundation.[4]

The other point upon which the matter has been criticised is that the tribunal gave no reasons for its decision. It would probably have been very much better if reasons had been given,[5] but that is not to say that a decision is necessarily to stand condemned because reasons were not given. It is becoming fashionable to speak as if the giving of reasons is essential to the proper conduct of judicial proceedings. For centuries English courts conducted a high proportion of their trials with juries and juries do not give reasons. Every year several thousand persons are tried in magistrates' courts and more often than not a magistrates' court when convicting says no more than "We find the case proved" or "There must be a conviction in this case." A student's book can even say that "English judges invariably give reasons for any legal rules which they apply."[6] The cure for statements of that kind is to sit in courts and to notice what actually does happen. If we were to accept the proposition that a decision of an inferior court or of a tribunal would necessarily be quashed if reasons had not been given, then we should have to say that a vast deal of injustice has been going on for centuries. Perhaps it has, but it is a little odd that it has escaped the notice of generations of lawyers until quite recently.

Woollett's case arose because the policy envisaged by the Agriculture Act, 1947, of compelling the most efficient use of land could only be carried through by over-riding the property rights of a number of people. Personally I have never thought that it was worth it: it has mostly been little people with bits of poor land, and I doubt whether the gain in agricultural production is enough to balance the upsets that it caused. However, Mrs.

[4] *Rule of Law*, p. 18 says: "Opinion was so outraged that the Minister decided to look into the case again. On reconsideration he could find no sufficient reason for retaining the land and he released it to Mrs. Woollett." The Minister merely said (*Hansard*, November 24, 1952, col. 156) that "in all the circumstances" he would not proceed with the acquisition, which does not carry the implication that the conservative lawyers impute to his reply. Lord Justice Denning's statement, *op. cit.*, p. 9: "The real merits could only be considered, and were considered, by the Minister after the court proceedings" does not rest on any basis of fact. The conduct of the Ministry in deciding whether to move for acquisition under s. 85 of the Act may well be criticised, for the officials dithered and took too long to make up their minds, but the attack that has been made is upon the decision of the Tribunal.

[5] *Rule of Law*, p. 18, states that: "The Agriculture (Miscellaneous Provisions) Act, 1954, has now provided that these tribunals shall give reasons." That is not so. The Act provides for stating a case on a point of law to the High Court, when of course reasons would be required, but these decisions are usually on fact and not law.

[6] Kiralfy, *The English Legal System*, (1954), p. 86. In an unreported case the Judicial Committee of the Privy Council rejected a contention that a decision of a court below should be set aside because reasons had not been given: London *Times*, Nov. 19, 1952.

Woollett's complaint was against the carrying out of a policy laid down in a statute.

The next instance is Crichel Down. The affair of Crichel Down is quite obviously going to pass into the folklore of this country. The story is apparently going to be that Lieut.-Comdr. Marten owned some land and that only by great perseverance did he succeed in protecting his property against the executive.[7] Crichel Down had of course been acquired before the war. When the officials discussed among themselves the future of Crichel Down, they assumed that as it was Crown property it could be dealt with in whatever way appeared most suitable, and they were quite right so to do. They were not "honest public servants sincerely convinced that their policy must over-ride a citizen's rights,"[8] for the very good reason that no citizen's rights were involved. The standard of ability shown in managing that land was bad, and the way in which potential tenants of the land were treated was also bad, but that has nothing to do with the private rights of the subject, any more than it would be if the Forestry Commission were to mismanage one of their forests or if a Royal Ordnance Factory were to mismanage its production of munitions.

It would be intelligible to put forward two propositions: (i) That where land has been acquired for a particular purpose and is no longer required for that purpose, the law should give a right to the previous owner or his successor to buy the land back; and (ii) that there should be a judicial process to enable such a person to enforce that right. The first proposition would be a perfectly reasonable rule, for a man may take no steps to oppose the acquisition of his land for purpose A, when he would have opposed it, perhaps successfully, if a move had been made to take it for purpose B. A local authority which has acquired land for one purpose has to go through a prescribed procedure before it may be allocated to another purpose. The Government has now made administrative provision for sale of unneeded land back to previous owners, and that might well be made a rule of law, though there would probably have to be a time limit. If the law were altered in this way it is doubtful if the second proposition would be needed, because, if there were a legal right to rebuy, it would follow that it could be enforced within our present legal system. But this is not what has been put forward by these authors. Lord Justice Denning and the conservative lawyers are emphatic that judicial review would have given relief, which can only mean that Lieut.-Comdr. Marten would have recovered "his" land: they put forward proposition (ii) without proposition (i). The idea is apparently that a citizen should have a right to bring officials before a court and force them to justify their actions.

[7] Among publications of vast circulation one may cite *The Listener*, May 19, 1955, p. 899 and *Picture Post*, May 28, 1955, p. 34.
[8] *Rule of Law*, p. 15.

That may be reasonable if official action has affected a citizen's rights, but the claim now made is that such judicial review should be available when no rights of the complainant are affected. It has even been said that the provision for it "is the peremptory demand of our times." [9] It comes to this, that any citizen is to have a right to arraign officials before a court on a charge of not doing their job properly, quite irrespective of whether that citizen has any *locus standi*.[10]

The third instance that has been taken [11] is that of poor Mr. Pilgrim who committed suicide: he had bought land at its full value, including development value, and then found that when it was acquired compulsorily from him he was only to be paid existing use value. There has been no serious suggestion that the land ought not to have been acquired compulsorily. The fact that Mr. Pilgrim would have got a great deal less for the land than he had paid for it was due to the operation of the provisions about compensation contained in the Town and Country Planning Act, 1947. This kind of case must inevitably occur if the basis of compensation on compulsory acquisition is different from the market value. It will happen again, for there will be purchasers of land who do not make full inquiry and do not get professional advice, and they will get caught out. I would gladly see the law altered in such a way that they would not get penalised, but we are here concerned with judicial review. How can it be said that if there had been proper provision for judicial review the tragedy of Mr. Pilgrim would not have occurred? I cannot see how any responsible court could have intervened in that case unless the court were to disregard the provisions of the relevant Acts of Parliament.

We therefore have three cases in which it has been suggested that if there had been judicial review a supposed injustice would not have taken place. In each case we come up against provisions of statutes; substantive law enabled a bit of land to be acquired; it enabled the Crown to deal with land that after all was Crown property; it required a local authority to pay compensation on a basis required by statute. What kind of judicial review is it that is to correct these things? Can we really let a judicial reviewing body alter our statutes? Of course we cannot, and it is demagogy to suggest that an extension of judicial review would have prevented the personal suffering that arose in these cases.

By all means let us examine the case for an extension of judicial review, but need its advocates open by trying to bamboozle the jury?

R. M. Jackson.*

[9] See 32 *Public Administration* (1954), p. 387.

[10] But is the judiciary trustworthy? These authors in their modesty are clear that in *Liversidge* v. *Anderson* everyone except Lord Atkin let the side down badly. And look what happened about Stevenage.

[11] Lord Justice Denning, *op. cit.*, p. 9.

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STATUTORY RESTRICTION OF JUDICIAL REVIEW

ALTHOUGH writers on administrative law have given a good deal of attention to the implications of statutory provisions which purport to exclude or limit the powers of review exercisable by the ordinary courts over the acts and decisions of Ministers and special tribunals, no fully comprehensive study of judicial interpretation of these provisions has been published. It may therefore be helpful to present a concise survey of the whole field, bringing together most of the decisions of the courts and indicating the main lines of interpretation.

I. THE PRESUMPTION AGAINST TAKING AWAY JURISDICTION

The courts have long been zealous to resist encroachments upon their jurisdiction. An attitude which may have originally been conditioned by the solicitude of the judges for their emoluments (which were dependent largely on fees paid by suitors) has been reinforced by traditions stemming from the battles successfully waged against the prerogative courts in the seventeenth century and by the unique prestige that the superior judges have since earned. The view is widely held that, in the words of Romer L.J., "the proper tribunals for the determination of legal disputes in this country are the courts, and they are the only tribunals which, by training and experience, and assisted by properly qualified advocates, are fitted for the task."[1] It is a common law presumption of legislative intent[2] that access to the Queen's courts is not to be denied save by clear words in a statute.[3] Subordinate legislation purporting to restrict or exclude access to the courts has been held to be *ultra vires* in the absence of express authorisation of such provisions in the parent Act.[4] At common law, moreover, a contract will be held to be illegal on grounds of

1 *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329 at p. 354.

2 Recently reaffirmed in *Goldsack* v. *Shore* [1950] 1 K.B. 708 at p. 712 and *Bennett & White (Calgary), Ltd.* v. *Municipal District of Sugar City, No. 5* [1951] A.C. 786 at p. 812. See also *Re Boaler* [1915] 1 K.B. 21 at p. 36.

3 See Maxwell on the *Interpretation of Statutes*, 10th ed. pp. 128–34, for the scope of the presumption, which is sometimes limited to issues involving common law rights.

4 *Chester* v. *Bateson* [1920] 1 K.B. 829; *Newcastle Breweries, Ltd.* v. *R.*, *ibid.*, 854; *R. & W. Paul, Ltd.* v. *Wheat Commission* [1937] A.C. 139. See also *Re Bachand* v. *Dupuis* [1946] 2 D.L.R. 641 (B.C.) (orders purporting to make execution of court judgments conditional on administrative approval, held invalid); and *Re Kellner's Will Trusts* [1949] 2 All E.R. 43.

public policy in so far as its terms forbid the parties to proceed in the ordinary courts.[5] Agreements to submit disputes to arbitration constitute a limited exception to this rule [6]; but a court has recently declined to give effect to an agreement by members of a voluntary association that its central council shall have the last word in the legal construction of rules of the association.[7] Also, it would seem that a testator cannot wholly deprive the courts of their power to construe the terms of his will.[8]

In matters of public law the role of the ordinary courts is of high constitutional importance. It is the function of the judiciary to pass upon the validity of acts and decisions of the executive and to afford protection to the rights of the citizen. Legislation which deprives them of this power to perform this function is often claimed to be inimical to the principle of the rule or supremacy of law. The executive, however, has shown an understandable reluctance to offer the citizen a sporting chance to disturb the course of administration, and has secured the passage of legislation designed to protect the exercise of its administrative and subordinate legislative powers against effective challenge in the courts. In addition, attempts have been made to limit or take away the inherent supervisory jurisdiction of the High Court over the determination of some classes of claims and controversies by Ministers and special tribunals.

Cases in which the courts have construed the legislative formulae commonly employed for these purposes will be considered in this article. The decisions are diffuse, and it may seem futile to attempt to relate them to one another; "the process of reasoning that because one set of words means one thing in one context . . . the same words in a different context must necessarily mean the same thing is often vexatious and fruitless." [9] But even an analysis which does no more than throw into relief the main trends of judicial interpretation may have its value; and it may emerge that problems which the courts are thought to be obliged to answer in only one way admit of alternative solutions.

[5] *Bennett* v. *Bennett* [1952] 1 K.B. 249; *cf. Addison* v. *Brown* [1954] 1 W.L.R. 779; *Goodinson* v. *Goodinson* [1954] 2 Q.B. 118.

[6] The parties cannot wholly exclude access to the courts by making the decision of the arbitrator final: *Czarnikow* v. *Roth, Schmidt & Co.* [1922] 2 K.B. 478; *Compagnie des Messageries Maritimes* v. *Wilson* (1955) 28 A.L.J. 465. Different considerations apply where arbitration is provided for by statute; see pp. 580–2, *post*.

[7] *Baker* v. *Jones* [1954] 1 W.L.R. 1005, applying *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. at p. 342.

[8] *Re Raven* [1915] 1 Ch. 673; *Re Wynn's Will Trusts* [1952] Ch. 271; though *cf. Dundee General Hospitals Board of Management* v. *Walker* [1952] 1 All E.R. 896 (H.L.); and see Mitchell, Note, 15 M.L.R. 497.

[9] *Kydd* v. *Liverpool Watch Committee* [1908] A.C. 327 at p. 331, *per* Lord Loreburn, L.C.

II. Statutory Provisions Taking Away the Machinery of Review

Certiorari

Statutory exclusion of the right to apply for certiorari is no longer the usual device adopted in this country for depriving the superior courts of powers of review. But it is still regularly used in many other Commonwealth countries, and the rules evolved in the earlier English cases where its effect was considered are important in those jurisdictions, as well as in England under some of the older statutes. They are of general interest, moreover, as the best illustrations of restrictive interpretation of privative enactments.

By the end of the seventeenth century it had been settled that a conviction or order made by any inferior statutory tribunal could be removed by certiorari into the Court of King's Bench to be quashed for excess or want of jurisdiction or error on the face of the record.[10] The court, viewing with disfavour the process of conviction without indictment,[11] and applying the principle that statutes creating new jurisdictions ought to be strictly construed,[12] laid it down that each summary conviction had to set out the evidence, and the conclusions of fact drawn from the evidence, and had to embody a proper judgment; and on applications for certiorari convictions were often quashed for trivial formal defects.[13] Parliament retaliated by purporting to take away the right to a certiorari under various statutes, either in express terms [14] or by providing that the matter was to be finally determined by the justices. The King's Bench, however, held that a general finality clause was insufficient to deprive the courts of their power to award the beneficial remedy of certiorari for patent errors of law [15] and jurisdictional defects,[16] unless the right to a certiorari had itself been conferred by statute.[17] It is arguable that Parliament, by continuing to use the same language in later Acts, has by implication accepted this interpretation [18]; so that the written decisions of tribunals established under the National

[10] See especially *Groenvelt* v. *Burwell* 1 Ld.Raym. 454 at p. 459; *Cardiff Bridge Case*, *ibid.*, 580.

[11] *R.* v. *Corden* (1769) 4 Burr. 2279.

[12] *Warwick* v. *White* (1722) Bunb. 106.

[13] For the procedure for reviewing justices' *orders*, see Note, 14 M.L.R. 209; Paley on *Summary Convictions*, 9th ed., pp. 722 *et seq.*; *R.* v. *Chantrell* (1875) L.R. 10 Q.B. 587; *Walsall Overseers* v. *L. & N. W. Ry.* (1878) 4 App.Cas. 30.

[14] This practice began towards the end of the seventeenth century, shortly after it had become usual to give a right of appeal from justices sitting out of sessions to Quarter Sessions: Paley, *op. cit.*, p. 800. See generally *R.* v. *Mahony* [1910] 2 I.R. 695 at pp. 730 *et seq.*, *per* Gibson J.

[15] As distinct from findings of fact: *R.* v. *Plowright* (1686) 3 Mod. 95.

[16] See, *e.g.*, *R.* v. *Plowright* (*supra*); *R.* v. *Moreley* (1760) 2 Burr. 1041; *R.* v. *Jukes* (1800) 8 T.R. 542. And see *R.* v. *Minister of Health* [1939] 1 K.B. 232 at pp. 246, 249.

[17] *R.* v. *Hunt* (1856) 6 E. & B. 408.

[18] See *R.* v. *Nat Bell Liquors, Ltd.* [1922] 2 A.C. 128 at p. 160.

Insurance and National Insurance (Industrial Injuries) Acts, although expressed in certain situations to be final,[19] may be quashed by certiorari if errors of law appear on the face of them.[20]

Even where the right to certiorari has been expressly taken away by statute, the courts, relying on one or other of the restrictive rules of interpretation already mentioned, or upon the contention that Parliament could not have intended a tribunal of limited jurisdiction to exceed its authority without the possibility of correction by a superior court, have persistently declined to construe the words of the statute literally. It has been held that certiorari will issue, notwithstanding the presence of words taking away the right to apply for it, if the inferior tribunal is improperly constituted (as where some of its members have a disqualifying interest),[21] or if it lacks or exceeds jurisdiction because of the nature of the subject-matter or failure to observe essential preliminaries,[22] or if a conviction or order has been procured by fraud or collusion.[23] There seems to be no English authority on the question whether such language prevents certiorari from issuing for patent error of law not going to jurisdiction or for breach of the *audi alteram partem* rule of natural justice.[24]

It has been suggested that the effect of express privative words is to take away certiorari in cases where the jurisdictional defect or fraud is not manifest,[25] or where the application is founded on mere irregularities of form or procedure.[26] But in any event the burden of establishing want or excess of jurisdiction or fraud lies on the applicant, and is not lightly discharged (especially if a jurisdictional defect is alleged to result from an erroneous finding of fact)[27]; and the courts exercise a wide discretion in deciding

[19] National Insurance Act, 1946, s. 43 (1); National Insurance (Industrial Injuries) Act, 1946, s. 36 (3).

[20] In *R.* v. *National Insurance Commr.* [1955] 1 Q.B. 139 the effect of the finality clause was left open. *Cf.* Griffith, Note, 18 M.L.R. 59.

[21] *R.* v. *Cheltenham Commrs.* (1841) 1 Q.B. 467; *R.* v. *L. & N. W. Ry.* (1863) 9 L.T.(N.S.) 423.

[22] *R.* v. *Somersetshire JJ.* (1826) 5 B. & C. 816; *R.* v. *St. Albans JJ.* (1853) 22 L.J.M.C. 142; *R.* v. *Wood* (1855) 3 E. & B. 49; *Ex p. Bradlaugh* (1878) 3 Q.B.D. 509.

[23] *R.* v. *Gillyard* (1848) 12 Q.B. 527; *Colonial Bank of Australasia, Ltd.* v. *Willan* (1874) L.R. 5 P.C. 417. Nor does a privative enactment affect the right of the Crown or a private prosecutor to apply for the order.

[24] In *R.* v. *Mahony* [1910] 2 I.R. 695 at pp. 741–3 Gibson J. was of the opinion that it would issue on these grounds despite a no-certiorari clause. See also *Re Toronto Newspaper Guild* [1951] O.R. 435 at pp. 462 *et seq.*; but *cf. New Zealand Waterside Workers' Federation* v. *Frazer* [1929] N.Z.L.R. 689 at p. 702, *per* Salmond J.; *R.* v. *Foster, ex p. Isaacs* [1941] V.L.R. 77; and *Re Industrial Appeals Court* [1955] Argus L.R. 675 at p. 679.

[25] *Colonial Bank of Australasia, Ltd.* v. *Willan* (*supra*) at p. 442. The rule there laid down has been applied in many Canadian, Australian and New Zealand cases. See also the South African case of *Union Government* v. *Fakir* [1923] A.D. 466, where the rule was approved in its application to judicial remedies in the Union.

[26] Paley, *op. cit.*, at pp. 807–8; *R.* v. *Mahony* (*supra*) at p. 742.

[27] See *R.* v. *Fulham, etc., Rent Tribunal, ex p. Zerek* [1951] 2 K.B. 1 at pp. 11–14; *Segal* v. *Montreal* [1931] S.C.R. 460.

whether irregularities of form or procedure go to jurisdiction. The extent to which a privative clause is deemed to narrow the scope of review is therefore obscure.

The attitude of the courts in other Commonwealth countries towards no-certiorari clauses is not uniform. In New Zealand, as in England, the courts have conceded them a limited if nebulous efficacy.[28] In Canada, where apparently unambiguous privative clauses are often embodied in legislation setting up administrative boards, restrictive interpretation has been carried so far that they have been rendered almost meaningless.[29] Critics have observed that " a court may always say that the ' decision ' of the ' board ' is not a ' decision ' since it was made without jurisdiction—and that the ' board ' is not a ' board ' because it acted without jurisdiction "[30]; and that " no form of words designed to oust judicial review will succeed in doing so against the contrary opinion of a superior court judge,"[31] except possibly a provision expressly prohibiting review for jurisdictional defects. In Australia, on the other hand, the High Court has given an effective field of operation to strong privative clauses, even though under the Constitution certain aspects of its powers of review cannot be wholly excluded by legislation.[32] A provision that the decision of a board " shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any ground whatsoever," has been interpreted as making jurisdictional defects invulnerable provided that the board's decision was a bona fide attempt to exercise its power, that it related to the subject-matter of the legislation and that it was reasonably capable of reference to the power given to it.[33] It would be open to English courts to adopt this Australian conception of a " manifest " defect of jurisdiction in like cases.[34]

[28] *New Zealand Waterside Workers' Federation* v. *Frazer* (*supra*); *Butt* v. *Frazer* [1929] N.Z.L.R. 636; *Re Otago Clerical Workers' Award* [1937] N.Z.L.R. 578; *Hani Paihana* v. *Tokerau District Maori Land Board* [1955] N.Z.L.R. 314.

[29] See H. Graham Batt, *Judicial Control of Administrative Acts and Decisions in Canada* (unpublished dissertation, University of London); H. Sutherland, Comment, (1952) 30 Can.Bar Rev. 69; Bora Laskin, " Certiorari to Labour Boards: the Apparent Futility of Privative Clauses," *ibid.*, 986.

[30] Sutherland, *loc. cit.*, at pp. 75–76.

[31] Laskin, *loc. cit.*, at p. 990.

[32] Sec. 75 (v) of the Constitution gives the High Court original jurisdiction in all matters in which mandamus, prohibition or an injunction is sought against an " officer of the Commonwealth."

[33] *R.* v. *Hickman, ex p. Fox and Clinton* (1945) 70 C.L.R. 598 at pp. 615 *et seq.*; *R.* v. *Murray, ex p. Proctor* (1948) 77 C.L.R. 387 at pp. 398–9; *R.* v. *Metal Trades' Employers' Association* (1951) 82 C.L.R. 208 at p. 249. These are all decisions on prohibition, but the same principle appears to apply to certiorari. See generally, Ross Anderson, " Parliament & Court," (1950) 1 U. of Queensld.L.J. (No. 2) 39, and Comment, (1952) 30 Can.Bar Rev. 933; and Geoffrey Sawer in *Essays on the Australian Constitution* (ed. Else-Mitchell), pp. 82–6.

[34] One of the few surviving instances of such a clause is s. 31 (3) of the Transport Act. 1953, applying s. 17 (6) of the Railway and Canal Traffic

Prohibition and Injunction

The decisions which show the difficulty of excluding review by certiorari ought not to be assigned to a unique category. In the eighteenth and nineteenth centuries the overwhelming majority of applications to set aside decisions of inferior courts and other statutory tribunals otherwise than by way of appeal were applications for certiorari to quash. What the courts sought to defend, in construing privative clauses restrictively, was not so much a peculiar sacrosanctity of the writ of certiorari as their own identification of the public interest with their retention of inherent powers of review. It is probable that the decisions on certiorari apply equally to prohibition.[35] A decision of the House of Lords on the availability of injunctions is also significant. A member of a friendly society who had been expelled by a procedure so irregular as to go to the jurisdiction of its committee was awarded an injunction despite a statutory provision that made its decisions "binding and conclusive" and "not removable into any court of law or restrainable by injunction."[36] This points to the conclusion that only by an exceptionally strongly worded formula can Parliament effectively deprive the superior courts of power to award any of the common law or equitable remedies which they dispense to keep inferior tribunals within their jurisdiction. On the other hand, a right of *appeal* to the courts, which is a creature of statute, may be taken away by much weaker formulae. And where no appeal is provided for from the decisions of a tribunal, the courts are chary of seeming to assume an appellate jurisdiction under the guise of exercising a supervisory jurisdiction.

III. Direct Exclusion or Limitation of Judicial Review by Modern Legislation

The distinction between the retention of supervisory powers and the assumption of appellate powers—a distinction easy to define but apt to become blurred in practice—may best be illustrated by cases in which the courts have construed statutes providing for the determination of specified questions by arbitration or by a Minister. The courts have recently been asked to review findings made upon claims by public employees for superannuation

Act, 1888. It provides that an order of the Transport Tribunal "shall not be question or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari, or otherwise . . ." However, there is a right of appeal from the Transport Tribunal to the Court of Appeal.

[35] See the Australian decisions, cited at note 33, *supra*; and *Jacobs* v. *Brett* (1875) L.R. 20 Eq. 1.

[36] *Andrews* v. *Mitchell* [1905] A.C. 78; contrast *Catt* v. *Wood* [1910] A.C. 404, where the error of law did not go to jurisdiction. See also *Wayman* v. *Perseverance Lodge* [1917] 1 K.B. 677.

benefits [37] and compensation for loss of office,[38] upon the redistribution of assets between public authorities [39] and upon disputes arising under the Agricultural Holdings Acts.[40] A coherent body of principles has emerged from these and other similar cases.

(1) The first question to answer, when Parliament has provided an extra-judicial method of determining a justiciable controversy, is whether the Act makes recourse to the new machinery optional or obligatory. If the subject-matter is one that normally falls within the jurisdiction of a superior court and the language of the Act is open to a construction that leaves open the right of access to the courts as an alternative method of proceeding, the Act may be so construed as to entitle the parties concerned to institute independent proceedings in a superior court at any stage, even after determination by the extra-judicial tribunal.[41]

(2) (a) If the words establishing the new machinery are clearly mandatory (*e.g.*, the matter "shall be determined by . . .") the jurisdiction of the courts over the subject-matter is ousted until the statutory process has been completed. They cannot assume jurisdiction before that time even with the consent of all parties.[42]

(b) After the statutory process has been completed, the determination may be challenged in the courts on restricted grounds by means of certiorari, an action for a declaration or any other appropriate procedure.

(c) The courts have jurisdiction to decide whether the authority which determined the matter was the authority designated by the Act,[43] whether an issue was one with which it was empowered to determine,[44] whether it did in fact address itself to the matters committed to it,[45] and whether it complied with the rules of natural justice in so far as it was under a duty to observe them. These are all questions going to jurisdiction.

(d) The determination of the competent authority cannot be

[37] *R.* v. *Minister of Health* [1939] 1 K.B. 232; *ibid.* [1942] 1 All E.R. 81, 551; *Wilkinson* v. *Barking Corporation* [1948] 1 K.B. 721; *Walters* v. *Eton R. D. C.* [1950] 2 All E.R. 588; *Healey* v. *Minister of Health* [1955] 1 Q.B. 221.

[38] *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338.

[39] *Gillingham Corporation* v. *Kent C. C.* [1953] Ch. 37; *East Midlands Gas Board* v. *Doncaster Corporation* [1953] 1 W.L.R. 54.

[40] *Goldsack* v. *Shore* [1950] 1 K.B. 708; *Brodie* v. *Ker*, 1952 S.C. 216.

[41] *Bennett & White (Calgary), Ltd.* v. *Municipal District of Sugar City, No. 5* [1951] A.C. 786 (determination of liability to tax assessment; held, decision by the alternative tribunal was not *res judicata*). See also *Eccles* v. *Wirral Rural Sanitary Authority* (1886) 17 Q.B.D. 107 at p. 112; *Shoeburyness U. D. C.* v. *Burges* (1924) 22 L.G.R. 684; and contrast *Dante* v. *Assessor for Ayr*, 1922 S.C. 109. And *cf. Re Birkenhead Corporation* [1952] Ch. 359.

[42] *Wilkinson* v. *Barking Corporation* (*supra*); *Healey* v. *Minister of Health* (*supra*) at pp. 231–2. Contrast the powers of the court in relation to arbitration clauses in *contracts*.

[43] *Walters* v. *Eton R. D. C.* (*supra*).

[44] *Goldsack* v. *Shore* (*supra*).

[45] *Board of Education* v. *Rice* [1911] A.C. 179.

impugned on the ground that it is erroneous in law or fact [46] unless the error goes to its jurisdiction, or unless an error of law is apparent on the face of a written decision issued by it (in which case the decision may be quashed by certiorari [47]), or (possibly) unless the error, although not strictly falling within these two categories, is so flagrant as to justify a finding that the authority must have misconceived or misused its powers.[48]

In most of the enactments considered in this group of cases the decision of the Minister or statutory arbitrator was not expressed to be final; yet the courts, while continuing to assert their supervisory jurisdiction, repeatedly affirmed that they could not invent a right of appeal where none existed, and conceded to the competent authority a power to err within the limits of its jurisdiction.[49] It may be noted, however, that a court which is satisfied that a determination of such a tribunal is wrong and which wishes to set it aside will rarely be at a loss to support its decision by reference to one or other head of its supervisory jurisdiction.

Finality Provisions

The effect of a provision that the decision of a tribunal shall be " final " is to take away a right of appeal to the superior courts where one already exists—*e.g.*, the appeal by way of case stated from courts of summary jurisdiction [50] and Quarter Sessions.[51] But the superior courts are tenacious of their supervisory jurisdiction, and there is ample authority for the proposition that even such words as " final and conclusive " do not protect the findings of subordinate bodies from review in any appropriate form of action, in so far as those findings are held to be preliminary or collateral to the central issue that was to be determined.[52] A

[46] *Crisp* v. *Bunbury* (1832) 8 Bing. 394; *R.* v. *St. Olave's Board of Works* (1857) 8 E. & B. 533; *Joseph Crosfield & Sons, Ltd.* v. *Manchester Ship Canal Co.* [1904] 2 Ch. 123 (affd. on this point [1905] A.C. 421); *Tithe Redemption Commission* v. *Wynne* [1943] K.B. 756; *Brodie* v. *Ker* (*supra*); and cases cited at notes 37 and 39, *supra*.

[47] *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* (*supra*). *Semble*, an action for a declaration may also be appropriate for this purpose: *Healey* v. *Minister of Health* (*supra*) at pp. 228–9; *cf. Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18.

[48] *Healey* v. *Minister of Health* (*supra*) at pp. 227–8, *per* Denning L.J. Such an error could be characterised as an excess of jurisdiction; see Note, 18 M.L.R. 163.

[49] Contrast the wider powers of review exercised over domestic tribunals: *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329; *Baker* v. *Jones* [1954] 1 W.L.R. 1005. For the requirement that domestic remedies must be exhausted before recourse may be had to the courts, see *White* v. *Kuzych* [1951] A.C. 585.

[50] *Westminster Corporation* v. *Gordon Hotels, Ltd.* [1907] 1 K.B. 910; [1908] A.C. 142; *Hall* v. *Arnold* [1950] 2 K.B. 543.

[51] *Kydd* v. *Liverpool Watch Committee* [1909] A.C. 327; *Piper* v. *St. Marylebone Licensing JJ.* [1928] 2 K.B. 221.

[52] *Bunbury* v. *Fuller* (1841) 9 Ex. 111 at p. 140 (distd. in *Tithe Redemption Commission* v. *Wynne* (*supra*)); *Murphy* v. *R.* [1911] A.C. 401. And see *Fenwick* v. *Rural Sanitary Authority of Croydon Union* [1891] 2 Q.B. 216 and

provision that an order made by the Minister of Transport, acting as an appellate authority, was to be "final and not subject to appeal to any court" did not preclude the courts from investigating whether he had acted within his jurisdiction.[53]

An alternative method by which the courts may nullify the effect of a finality clause is to limit its operation to subject-matters other than those in issue before them.[54]

Conclusive Evidence Clauses

It has not proved beyond the resources of the parliamentary draftsman to devise a formula adequate to bar all proceedings in the courts. A clause making the confirmation of a compulsory purchase order final and of effect as if enacted in the Act and "conclusive evidence that the requirements of this Act have been complied with, and that the order is duly made and is within the powers of this Act," has been held to exclude any inquiry into the *vires* of the order on an application for certiorari,[55] despite the absence of any words expressly taking away the right to a certiorari. The Committee on Ministers' Powers doubted whether even this type of clause (which appeared in a number of statutes passed before 1932 [56]) would protect an order that was manifestly unrelated to the scheme of the Act.[57] A conclusive evidence clause that includes a small element of ambiguity may indeed be circumvented. Where an Irish Act empowering a local authority to make by-laws for certain purposes provided that a printed copy of such by-laws should be conclusive evidence of their validity, a court held that the effect of the word "such" was to confer finality only on by-laws which came within the purposes prescribed.[58] There are other cases, however, in which the courts have given full effect to provisions plainly designed to cure defects

Att.-Gen. v. *Hanwell U. D. C.* [1900] 1 Ch. 51; [1900] 2 Ch. 377, for the ineffectiveness of the words "binding and conclusive" to exclude review on jurisdictional grounds.

53 *R.* v. *Minister of Transport, ex p. H. C. Motor Works, Ltd.* [1927] 2 K.B. 401 (see Roads Act, 1920, s. 14 (3)). See generally, on the ineffectiveness of finality clauses to take away certiorari, p. 577, *ante*.

54 See *St. Lucia Usines Co.* v. *Colonial Treasurer* [1924] A.C. 508 at p. 513; *Gateshead Union* v. *Durham C. C.* [1918] 1 Ch. 146; *Seabrooke* v. *Grays Thurrock Local Board* (1891) 8 T.L.R. 19.

55 *Ex p. Ringer* (1909) 73 J.P. 436; see also *Reddaway* v. *Lancs. C. C.* (1925) 41 T.L.R. 422; *Minister of Health* v. *R., ex p. Yaffe* [1931] A.C. 494 at pp. 520, 532–3; and *Trustees of the London Parochial Charities* v. *Att.-Gen.* [1955] 1 All E.R. 1 (an Order in Council approving a scheme made by the Charity Commissioners was protected by a formula similar to that considered in *Ex p. Ringer*; the order was held to have the same effect as a statute). In *Merricks* v. *Heathcoat-Amory* [1955] Ch. 567 Upjohn J. found it unnecessary to consider the legal effect of a similar formula.

56 See Willis, *The Parliamentary Powers of English Government Departments*, pp. 101–6; and the Housing Act, 1930, Sch. III, para. 2.

57 Cmd. 4060 (1932), 40.

58 *Corporation of Waterford* v. *Murphy* [1920] 2 I.R. 165. See also *Damodhar Gordhan* v. *Deoram Kanju* (1875) 1 App.Cas. 332.

in the orders or proceedings of statutory bodies.[59] It would be idle to draw any conclusion from this motley collection of cases.

Exclusion of the Right to Challenge after a Specified Period

In the late 1920s and early 1930s strong criticism was directed against statutory formulae that were devised with a view to denying the citizen his right to go to the courts to challenge the validity of Ministerial edicts taking away his property. On the other hand, it was generally recognised that it was seriously detrimental to the public interest for a major housing or planning scheme to be held invalid, on account of a technical flaw, a year or more after it had been brought into operation. An attempt was made to reconcile the competing claims of individual access to the courts and the general welfare by incorporating in statutes which authorise the issue of orders or certificates for the compulsory acquisition or retention of land by public authorities a provision allowing the validity of the order or certificate to be challenged in the High Court on prescribed grounds within a period of six weeks but excluding any challenge after the expiry of that period. Under the formula of which the Housing Act, 1930, furnished the prototype, the order is protected after six weeks from being questioned by "prohibition or certiorari or in any legal proceedings whatsoever." The formula adopted in the first schedule to the Acquisition of Land (Authorisation Procedure) Act, 1946, and applied in many recent statutes, does not expressly mention prohibition or certiorari, but it is conceived that it would be effective in excluding these remedies after the expiry of the six weeks' period. In cases in which the validity of order and certificates protected by these formulae have been impugned in other forms of proceedings, the courts have held that they have no jurisdiction to consider the merits of the challenge.[60] Courts may be expected to regard a provision which limits only the time within which their powers are exercisable, more benevolently than one which could be construed as taking away those powers altogether. Challenges made within the six weeks' period have in practice rarely succeeded, because of the amplitude of the discretionary powers vested in public authorities by Parliament.

[59] *R.* v. *Middlesex JJ., ex p. Walsall Union* [1907] 2 K.B. 581; *Woollett* v. *Minister of Agriculture and Fisheries* [1955] 1 Q.B. 103. See also *R.* v. *Agricultural Land Tribunal (South Eastern Area), ex p. Hooker* [1952] 1 K.B. 1 (where a duly certified copy of a decision of a tribunal was expressed to be "conclusive evidence" of that decision, the tribunal could not afterwards rectify a mistake in the decision thus certified). See also *Postmaster-General* v. *Wadsworth* (1939) 56 T.L.R. 1.

[60] *Tutin* v. *Northallerton R. D. C.* [1947] W.N. 189; *Uttoxeter U. D. C.* v. *Clarke* [1952] 1 All E.R. 1318 at p. 1321; *Woollett* v. *Minister of Agriculture and Fisheries* (*supra*); *Smith* v. *East Elloe R. D. C.* [1955] 2 All E.R. 19 (formula excludes challenge directed against bona fides). See also *R.* v. *Middlesex JJ., ex p. Walsall Union* (*supra*); and contrast *R.* v. *Sankey* (1878) 3 Q.B.D. 379 at pp. 383–4.

"*Shall not be questioned in any Court of Law*"

Another formula, which appears in several important statutes, provides in general terms that a legislative or executive order or a decision of a tribunal shall not be called in question in any court of law. In view of the persistent refusal of the courts to interpret literally no-certiorari clauses (many of which included general words excluding other forms of review), it is strange that the efficacy of these general privative formulae does not appear to have been tested in the English courts.

There can be little doubt that the general formula protecting decisions of the tribunals dealing with applications for exemption from national service on grounds of conscientious objection and deferment on grounds of hardship [61] does not oust the supervisory jurisdiction of the High Court. But there are other legislative contexts in which similar words may well be held to bar recourse to the courts on any ground. Under section 26 of the British Nationality Act, 1948, the exercise of the Secretary of State of his discretion in relation to applications for naturalisation, registration or deprivation or renunciation of citizenship, is not to be "subject to appeal or review in any court." In predicting the attitude of the courts towards this section, their interpretation of the Secretary of State's power to deport aliens may be relevant. They have treated his discretion (which is not in terms protected against judicial review) as being essentially a matter of executive policy over which they are incompetent to exercise any control [62] unless, possibly, it is used for an improper purpose, *e.g.*, deporting a political refugee.[63] There would seem to be no analogous implied limitation upon his discretion under the British Nationality Act, and the presence of the words expressly prohibiting review might be held even to preclude the impeachment of his bona fides in the courts.

Where a similar formula is contained in statutes dealing with foreign relations or the working of the parliamentary system, the probability that the courts will give the privative words a literal interpretation becomes overwhelming. The courts have often shown themselves ready to accept as conclusive declarations made on behalf of the Crown by responsible Ministers on matters of State,[64] and anxious not to appear as intruders in the domain of Parliament.[65] It is almost certain that the following

[61] National Service Act, 1948, ss. 15 (2), 22 (2).

[62] *R.* v. *Home Secretary, ex p. Duke of Chateau Thierry* [1917] 1 K.B. 933: *R.* v. *Leman St. Police Station Inspector, ex p. Venicoff* [1920] 3 K.B. 72.

[63] *R.* v. *Governor of Brixton Prison, ex p. Sarno* [1916] 2 K.B. 742; *cf. R.* v. *Governor of Brixton Prison, ex p. Bloom* (1921) 90 L.J.K.B. 574 at p. 576: and see *R.* v. *Chiswick Police Station Superintendent, ex p. Sacksteder* [1918] 1 K.B. 578.

[64] Oppenheim, *International Law*, Vol. I (8th ed.), pp. 765–7.

[65] As where attempts have been made by litigants to impugn the validity of Private Bills, or the internal proceedings of the House of Commons, or orders made under the House of Commons (Redistribution of Seats) Acts (*post*).

statutory provisions would be held wholly to exclude judicial review: section 5 of the Extradition Act, 1870, relating to Orders in Council that apply the provisions of the Act to any foreign State [66]; section 3 of the Parliament Act, 1911, which makes a certificate given by the Speaker under the Act conclusive for all purposes and immune from challenge in any court of law [67]; and section 3 (7) of the House of Commons (Redistribution of Seats) Act, 1949, which provides that the validity of an Order in Council (for the delimitation of constituencies) purporting to be made under the Act and reciting that a draft thereof has been approved by both Houses shall not be questioned in any legal proceedings whatsoever.[68]

It may be noted that the constitutions of some Commonwealth countries expressly forbid the courts to inquire into certain political questions—*e.g.*, whether any, and if so what, advice has been given by Ministers to the President [69] or by the Executive Council to the Governor-General,[70] or whether the Governor-General or Governor has complied with his obligation to observe the constitutional conventions obtaining in the United Kingdom.[71]

"*As if enacted*"

The formula which provides that a regulation or order, when made or confirmed, shall have effect as if enacted in the parent Act, has been the subject of a plethora of decisions and dicta in the courts; and the two cases in which it was considered by the House of Lords [72] cannot be reconciled without great difficulty. Its history and its interpretation by the courts have been exhaustively analysed by learned commentators,[73] who disagree sharply with one another both on the meaning that ought properly to have been attributed to it and on the results of judicial interpretation. According to one view its unequivocally expressed

[66] The section provides that an Order in Council applying the Act to a foreign State "shall be conclusive evidence that the arrangement therein referred to complies with the requisitions of this Act . . . and the validity of such order shall not be questioned in any legal proceedings whatsoever."

[67] The certificate is conclusive for the purposes of the Parliament Act, 1949, also. For the probable limits of the effect of such a certificate, see D. V. Cowen, "Legislature and Judiciary," (1953) 16 M.L.R. 273 at p. 279, n.

[68] *Cf. Harper* v. *Home Secretary* [1955] Ch. 238.

[69] Constitution of India, art. 74 (2); see, for Pakistan, Government of India Act, 1935, s. 10 (4).

[70] Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953, Annex. art. 39.

[71] Ceylon (Constitution) Order in Council, 1946, art. 4 (2), (3); Gold Coast (Constitution) Order in Council, 1954, s. 7 (2).

[72] *Institute of Patent Agents* v. *Lockwood* [1894] A.C. 347; *Minister of Health* v. *R., ex p. Yaffe* [1931] A.C. 494.

[73] See especially W. M. Graham-Harrison, *Notes on the Delegation by Parliament of Legislative Powers*, pp. 26–68; John Willis, *The Parliamentary Powers of English Government Departments*, pp. 62–101, 191–6. See also Bernard Schwartz, *Law and the Executive in Britain*, pp. 176–88; C. K. Allen, *Law and Orders*, pp. 137–41.

purpose is to give subordinate legislation the same effect as an Act of Parliament; according to another view it is nothing more than the survival of a common form that has been used since the fourteenth century to emphasise that the authority for making subordinate instruments is derived from Parliament. The courts have steered an erratic course, but have generally veered towards a solution which enables them to retain a qualified power to pass upon the *vires* of the instrument. Support for one or more of the following propositions can be found in the cases:

(a) The appropriate authority may be restrained from proceeding to make or confirm a scheme or order which is *ultra vires*.[74]

(b) Any procedural conditions precedent to the making of the order must be complied with.[75]

(c) If the order, when made, is inconsistent with sections of the Act other than the enabling section, the Act will take primacy and the order will be invalid.[76]

(d) The Minister must not travel outside his functions altogether.[77]

But (e) If the order, when made, genuinely purports to be related the purposes of the enabling section and the Act as a whole, its validity may be upheld although, in the absence of an "as if enacted" clause, it might have been held to be *ultra vires*.[78]

The formula has ceased to be used in United Kingdom legislation, but it still survives in some statutes of constitutional importance.[79]

If an Act authorises the making of regulations to "modify or extend" certain of its provisions, it would seem that such regulations, provided that they are related to the provisions in question, cannot be impugned in the courts.[80] A provision that an

[74] *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171; *R.* v. *Minister of Health, ex p. Davis* [1929] 1 K.B. 619. But the courts will not directly interfere with parliamentary proceedings on subordinate legislation; see Note, p. 618, *post*.

[75] *Minister of Health* v. *R., ex p. Yaffe* (*supra*).

[76] *Ibid.*; *Glasgow Insurance Committee* v. *Scottish Insurance Commissioners*, 1915 S.C. 504 at pp. 509–10; *Foster* v. *Aloni* [1951] V.L.R. 481.

[77] *Minister of Health* v. *R., ex p. Yaffe* (*supra*).

[78] This proposition, although inconsistent with some of the judgments in the Court of Appeal ([1930] 2 K.B. 98) and in the House of Lords ([1931] A.C. 494) in *Yaffe's Case* (where the clause was rendered almost nugatory), is consistent with the judgments of Lord Herschell in *Lockwood's* case and Lord Strathclyde in the *Glasgow* case, is supported by commentators (see Graham-Harrison, *op. cit.*, at pp. 35–61; Willis, *op. cit.*, at p. 82) and was adopted in the recent Australian case of *Foster* v. *Aloni* [1951] V.L.R. 481.

[79] *e.g.*, Foreign Jurisdiction Act, 1890, s. 11; Emergency Powers Act, 1920, s. 2 (4).

[80] See Factories Act, 1937, s. 60; *Miller* v. *Boothman* [1944] K.B. 337; *Nickolls* v. *Austin* [1945] K.B. 50 (affd. [1946] A.C. 493); *Franklin* v. *The Gramophone Co., Ltd.* [1948] 1 K.B. 542; *Benn* v. *Kamm* [1952] 2 Q.B. 127 (revg. [1952] 1 T.L.R. 57); Allen, *op. cit.*, Appx. I; Grunfeld, Note. 15 M.L.R. 239.

instrument made under an Act shall have effect notwithstanding anything inconsistent therewith contained in any other Act will no doubt be given its literal meaning.[81]

IV. Indirect Exclusion or Limitation of Judicial Review

Judicial hostility towards statutory formulae which are capable of being read as excluding or substantially limiting the reviewing powers of the courts is by no means confined to the British Commonwealth. Decisions of the American courts[82] and of the French Conseil d'État[83] show similar attitudes. The possibility that the legislature might intervene to correct an excess or abuse of authority by an inferior tribunal or the administration is not regarded as a proper substitute for judicial review.

But there is more than one method of excluding judicial review. By prescribing common forms for summary convictions, omitting a recital of the evidence and of the reasons for the decision, Parliament attenuated the supervisory jurisdiction of the courts far more effectively than by no-certiorari clauses.[84] And by giving powers to Ministers and other statutory bodies in terms so broad that it becomes difficult for a court ever to hold that they have been exceeded, administrative finality is achieved more simply than by formulae which are widely regarded as objectionable and which the courts have been disposed to construe restrictively.

It is now the rule rather than the exception to confer upon public authorities powers which are exercisable when they are "satisfied," or when "it appears to" them, or when "in their opinion," a certain state of affairs exists; or which are to be related to loosely defined purposes; or which enable them to take such action as they "think fit" in relation to a subject-matter. It has become exceptional, moreover, for the courts to set effective limits to the powers so conferred. The principle, many times affirmed in older cases, that even wide discretionary powers must be exercised "judicially,"[85] is seldom applied where the recipient of the power is a Minister of the Crown. The courts often invoke the principle of ministerial responsibility to Parliament in support of their refusal to review the manner in which a discretion has been exercised. When the discretion is vested in a local authority,

[81] Emergency Powers (Defence) Act, 1939, s. 1 (4); *R.* v. *Industrial Disputes Tribunal, ex p. East Anglian Trustee Savings Bank* [1954] 1 W.L.R. 1093 at pp. 1099–1100.

[82] K. C. Davis, *Administrative Law*, chap. 11.

[83] C. J. Hamson, *Executive Discretion and Judicial Control*, pp. 157–60. In Italy exclusion of judicial review of administrative action is prohibited by the Constitution: S. Galeotti, *The Judicial Control of Public Authorities in England and in Italy*, p. 89.

[84] Summary Jurisdiction Act, 1848; see *R.* v. *Nat Bell Liquors, Ltd.* [1922] 2 A.C. 128 at p. 159.

[85] See, *e.g.*, *Leader* v. *Moxon* (1773) 3 Wils. K.B. 461 (paving commissioners empowered to execute street works in such manner "as they shall think fit"; held, action for trespass lay where they had exercised their discretion oppressively).

the courts have not been so ready to concede that it is absolute, and when it is vested in an administrative tribunal they have sometimes imposed a strict supervisory control; but the benevolent interpretation of the powers of Ministers has tended to condition the attitude of the courts towards all statutory bodies.

The formulation of statutory powers in "subjective" terms has increased vastly since 1939. The emergency legislation of the Second World War gave the executive sweeping powers over persons and property. The wording of the grants of power was sufficient, on a literal interpretation, to support the validity of almost any act purporting to be done in pursuance of them. Not only did the courts give a literal interpretation to subjectively worded formulae; in their anxiety not to impede the war effort they declined to give a literal interpretation to a formula which prima facie enabled them to review the exercise of an important discretionary power. The decision in *Liversidge* v. *Anderson*,[86] where the courts held that the Secretary of State's power to order the detention of any person whom he had "reasonable cause" to believe to be of hostile origins or associations was validly exercised if he honestly thought he had reasonable cause for that belief, was the high-water mark of judicial self-restraint. It is unlikely that such an interpretation will ever again be given to a similar form of words except in conditions of emergency.[87] However, the literal construction of the subjective type of formula has been repeated in many subsequent cases which have had no obvious connection with national emergency.

The main recent trends of interpretation of wide statutory powers may be summarised by roughly classifying the powers as follows:

(1) Where the relationship between the subject-matter of the power to be exercised and the purposes prescribed by statute is placed within the discretion of the competent authority.

Thus, section 1 (1) of the Emergency Powers (Defence) Act, 1939, empowered His Majesty in Council to make such regulations as appeared to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community.[88] It was held that it was not open to anyone to canvass in the courts the necessity or

[86] [1942] A.C. 206.

[87] See *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66 at pp. 76–7; *Smith* v. *Cardiff Corporation (No. 2)* [1955] Ch. 159 at p. 175. A "subjective" interpretation of words which do not in terms confer an absolute discretion was also adopted in two Indian appeals, where the Privy Council held that the Governor-General of India, who was empowered to make ordinances for peace, order and good government "in cases of emergency," was the sole judge of the existence of an emergency: *Bhagat Singh* v. *King-Emperor* (1931) L.R. 58 I.A. 169; *King-Emperor* v. *Benoari Lal Sarma* [1945] A.C. 18.

[88] See further, the Emergency Powers (Defence) Act, 1940, s. 1; and the Supplies and Services Acts, 1945-51.

expediency for making any such regulation that was good on its face,[89] or any order made in virtue of a regulation which reproduced similar enabling words.[90]

> "All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction." [91]

The burden of establishing that the competent authority did not honestly believe that its conduct was directed to the furtherance of any of these comprehensive purposes, but was acting in pursuance of an ulterior motive, would be almost impossible to discharge. Where, on the other hand, the permitted purposes are defined with more precision, the practical scope of review could be somewhat broader. If an order or decision is shown to be grossly unreasonable or otherwise lacking in any evidentiary support, it might be held that since it bears no apparent relation to the purposes of the Act the authority could not be deemed to have been genuinely satisfied that it was appropriate for giving effect to those purposes. But the English courts are chary of admitting unreasonableness as a ground for challenging executive action [92]; and Ministers may often act on evidence that they are not obliged to disclose in court.[93] In recent cases where this type of formula has been considered, emphasis has been laid rather on the amplitude of the discretionary power than on the need to relate it to the purposes of the Act.[94]

[89] *R.* v. *Comptroller-General of Patents, ex p. Bayer Products, Ltd.* [1941] 2 K.B. 306.

[90] *Progressive Supply Co.* v. *Dalton* [1943] Ch. 54 (trading restrictions); *Point of Ayr Collieries, Ltd.* v. *Lloyd-George* [1943] 2 All E.R. 547; *Carltona, Ltd.* v. *Commissioners of Works, ibid.*, p. 560; *Pollok School Co.* v. *Glasgow Town Clerk*, 1946 S.C. 373 at p. 386, 1947 S.C. 605 (requisitioning); *Demetriades* v. *Glasgow Corporation* [1951] 1 All E.R. 457 (use of requisitioned property). A like interpretation has been given to similarly worded Canadian emergency legislation; *Reference re Chemical Regulations* [1943] S.C.R. 1; *Att.-Gen. for Canada* v. *Hallet & Carey, Ltd.* [1952] A.C. 427. See also *Underhill* v. *Ministry of Food* (1950) 66 T.L.R. (Pt. 1) 730 at p. 733 (orders for rationing of sweets made in virtue of s. 1 of the Supplies and Services (Transitional Powers) Act, 1945).

[91] *Carltona Ltd.* v. *Commissioner of Works* (*supra*) at p. 564, *per* Sir Wilfrid Greene M.R. *Cf. Demetriades* v. *Glasgow Corporation* (*supra*), at p. 463, where Lord Reid suggested that action so unreasonable as to be perverse might also be reviewable.

[92] See, *e.g.*, *Minister of Agriculture and Fisheries* v. *Price* [1941] 1 K.B. 116; *Horton* v. *Owen* [1943] K.B. 111; *Taylor* v. *Brighton Corporation* [1947] K.B. 736; *Berney* v. *Att.-Gen.* [1947] L.J.R. 983; *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223.

[93] *Robinson* v. *Minister of Town and Country Planning* [1947] K.B. 702.

[94] See *Minister of Agriculture and Fisheries* v. *Price* (*supra*; directions with respect to use of land); *Robinson* v. *Minister of Town and Country Planning*

(2) Where the competent authority is empowered to take a prescribed course of action, if it is satisfied that it is necessary in the public interest.

Here, too, the courts have held that they cannot go behind a statement by the competent authority, acting in good faith, that it was in fact satisfied that the statutory conditions for the exercise of the power existed.[95]

(3) Where the competent authority is empowered to take a prescribed course of action when it "is satisfied," or when "it appears" to it, or when "in its opinion," a given state of affairs exists which the High Court would be capable of investigating independently on the basis of evidence or legal argument.

In cases set in this type of context the expression of the opinion or satisfaction of the competent authority has usually been accepted as conclusive [96]—"if a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him" [97]—but there are several dicta indicating that the act of the authority might be held invalid if it were shown that there was no evidential or rational basis upon which it could have formed its opinion.[98] Moreover, in a Privy Council case a board which had power to declare a dwelling-place insanitary whenever it appeared to the board that it was unfit for human habitation was held to have exceeded its jurisdiction by applying a wrong legal test of unfitness.[99] The High Court of Australia, which was recently called upon to review the conduct of a board empowered to cancel the registration of an employer of dock labour if "satisfied" that he was unfit to be registered or had so

(*supra*); *Taylor* v. *Brighton Corporation* (*supra*); *Swindon Corporation* v. *Pearce* [1948] 2 All E.R. 119 (orders relating to town planning schemes).

[95] *Re Beck and Pollitzer's Application* [1948] 2 K.B. 339 (order stopping up a highway); *Land Realisation Co.* v. *Postmaster-General* [1950] Ch. 435 (order for compulsory acquisition of land).

[96] *Robinson* v. *Sunderland Corporation* [1899] 1 Q.B. 751 at p. 757 (exercise of sanitary powers by local authority); *R.* v. *Minister of Health, ex p. Hack* [1937] 3 All E.R. 176 (satisfaction of Minister that proper statutory notices had been served); *Horton* v. *Owen* (*supra*); *Conway* v. *Stocks* [1943] K.B. 438 (opinion of wartime national service officers held conclusive). See also *Allcroft* v. *Bishop of London* [1891] A.C. 666, *Institute of Patent Agents* v. *Lockwood* [1894] A.C. 347 and *Att.-Gen.* v. *A. W. Gamage Ltd.* [1949] 2 All E.R. 732 for "subjective" interpretations of "in the opinion of." And see *Memudu Lagunju* v. *Olubadan-in-Council* [1952] A.C. 387 ("shall be the sole judge").

[97] *Allcroft* v. *Bishop of London* (*supra*) at p. 678.

[98] See *Re Bowman* [1932] 2 K.B. 621 at p. 634; *Re Falmouth Clearance Order* [1937] 3 All E.R. 308; *Re L. C. C. Order* [1945] 2 All E.R. 484; *Thorneloe & Clarkson, Ltd.* v. *Board of Trade* [1950] 2 All E.R. 245 at p. 247. And *cf. Dundee General Hospitals Board of Management* v. *Walker* [1952] 1 All E.R. 896 at pp. 903, 905, 907–8.

[99] *Estates & Trust Agency (1927) Ltd.* v. *Singapore Improvement Trust* [1937] A.C. 898.

acted as to interfere with the proper performance of stevedoring work, held that it was entitled to award prohibition against the board if the board was acting without any evidence to support the facts upon which its jurisdiction depended, or if it was adopting an erroneous test of the employer's liability to cancellation of his registration, or if it appeared likely to go outside the scope of its statutory discretion.[1] It may be possible to persuade English courts to take a similar view of statutory provisions relating to the powers of inferior tribunals or bodies which have some of the characteristics of tribunals; for they still show a greater readiness to review the findings of tribunals than the exercise of executive powers, and often give a broad interpretation to the concept of limited jurisdiction.[2] Thus, although a distinction is drawn between tribunals to which Parliament has entrusted, by apt words, the power to determine conclusively matters on which their jurisdiction depends, and tribunals which lack that power,[3] the courts have excluded rent tribunals from the former category even with respect to powers exercisable "when it appears to them" that an unlawful premium has been paid.[4]

(4) Where the competent authority is empowered to take such action or to impose such conditions as it thinks fit in relation to a subject-matter.

In a number of cases the courts have declined to construe such words as investing the authority with an absolute discretion to do as it pleases. The Minister of Transport in hearing appeals in certain licensing cases has power to make such order "as he thinks fit"; but the courts have held that he must none the less confine himself to matters brought before him on the appeal and must not have regard to irrelevant considerations in exercising his discretion.[5] A local authority empowered to attach such conditions as it thinks fit to the grant of a licence or permit must have regard to relevant considerations and disregard the irrelevant, even though the factors which it is to take into account are not mentioned in the Act; nor must its decision

[1] *R.* v. *Australian Stevedoring Industry Board* (1952) 88 C.L.R. 100 at p. 117–8; see also *R.* v. *Connell* (1944) 69 C.L.R. 407.

[2] See de Smith, "Wrongs and Remedies in Administrative Law" (1952) 15 M.L.R. 189 at pp. 195–7.

[3] *R.* v. *Special Commissioners of Income Tax* (1888) 21 Q.B.D. 313 at p. 319; *R.* v. *Ludlow, ex p. Barnsley Corporation* [1947] K.B. 634.

[4] *R.* v. *Fulham, etc., Rent Tribunal, ex p. Phillipe* [1950] 2 All E.R. 211; *R.* v. *Barnet, etc., Rent Tribunal, ex p. Millman, ibid.*, p. 216.

[5] *R.* v. *Minister of Transport, ex p. H. C. Motor Works, Ltd.* [1927] 2 K.B. 401; *R.* v. *Minister of Transport, ex p. Upminster Services, Ltd.* [1934] 1 K.B. 277.

be such as no reasonable authority could ever have reached.[6] It may be assumed that the authority must also genuinely address itself to the application before it, must consider it on its individual merits, and must not try to promote a purpose alien to the spirit of the Act. To this extent the standards which justices of the peace have been required to observe in issuing process[7] have been imposed upon local authorities in the exercise of wide discretionary powers. In other contexts also the courts have set limits to the statutory discretions of local authorities. Authorities empowered to pay such wages as they think fit to their employees and to charge such fares as they think fit (subject to fixed maxima) to passengers on their transport undertakings have been held to stand in a fiduciary position with respect to their ratepayers and to be obliged to be guided by business principles and not by philanthropic considerations in fixing the amounts.[8] The courts, while conceding that Parliament has given the authority concerned a wide discretion, have none the less hedged it about with limitations that they hold to lie implicit in the context of the legislation. But it would be unwarrantable to assume that the same form of words will receive the same restrictive interpretation in totally different contexts—*e.g.*, where the power is confided in a Minister acting in a capacity in which he may have to take into account broad considerations of national policy.[9]

Finally, where a right of appeal to the courts is provided from the decision of an authority that has power to take specified action according to its satisfaction or opinion or in its discretion, or to impose such conditions as it thinks fit, the courts may hold that on the construction of the relevant legislation they have full power to examine the merits of the authority's decision and to set it aside if they are satisfied that it is wrong.[10]

[6] *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223.

[7] See *R.* v. *Boteler* (1864) 4 B. & S. 959 and *R.* v. *Adamson* (1875) 1 Q.B.D. 201, where powers to issue warrants and summonses "if they shall think fit" were held to have been improperly exercised.

[8] *Roberts* v. *Hopwood* [1925] A.C. 578; *Prescott* v. *Birmingham Corporation* [1955] Ch. 210. For criticism, see Griffith, Note, 18 M.L.R. 159.

[9] *Cf.* the attitude of the courts towards the discretionary power of Ministers to make or confirm orders under the Town and Country Planning and Housing Acts: see *Robinson* v. *Minister of Town and Country Planning* [1947] K.B. 702; *Johnson (B.) & Sons (Builders), Ltd.* v. *Minister of Health* [1947] 2 All E.R. 395 at pp. 398–400; *Robins (E.) & Sons, Ltd.* v. *Minister of Health* [1939] 1 K.B. 520.

[10] See *Fletcher* v. *Ilkeston Corporation* (1931) 48 T.L.R. 44; *Middlesex C. C.* v. *Miller* [1948] 1 K.B. 438; *Stepney B. C.* v. *Joffe* [1949] 1 K.B. 599; *Commissioner of Stamp Duties (N.S.W.)* v. *Pearse* [1954] A.C. 91. And

V. Conclusion

There is an obvious inconsistency in the attitudes of the courts towards the two main classes of statutory formulae considered in this article. In the face of formulae that appear to have been devised for the express purpose of ousting their supervisory jurisdiction (either by making administrative action final and conclusive or by excluding named remedies) they have clung tenaciously to their powers of review. Yet they have been content to give a literal interpretation to words conferring powers in subjective terms on Ministers and some other authorities. The explanation of this discrepancy is largely historical. Finality and no-certiorari clauses were originally introduced to protect the decisions of inferior courts; the King's Bench, which had assumed a general superintendence over those courts, was unwilling to withdraw from the field, and the precedents evolved in interpreting the statutory formulae were followed in cases where Parliament had purported to give a like protection to the acts and decisions of administrative bodies. But the leading cases on the "is satisfied" type of formula are concerned either with the powers of Ministers and other executive officers in wartime and the immediate post-war years, or with the powers of local authorities in housing and town planning law; and the courts were more easily persuaded that the public interest did not call for a restrictive interpretation of such grants of power. As has been indicated, they have in some cases neglected opportunities to require that a minimum of evidential support be shown for orders purporting to be made in the exercise of those powers. In other cases, however, the wording of the enabling legislation has been such as to preclude any effective challenge in the courts. When the Minister of Transport is empowered to order the permanent stopping up of a highway "if he is satisfied that in the public interest it is expedient or necessary to do so,"[11] the court can hardly go behind the Minister's expression of his satisfaction on this matter without distorting the plain words of the Act. But it is difficult to see why it should be necessary for Parliament to grant powers in such terms save in matters of the highest public importance. To make an authority the sole judge of the occasion for exercising an unqualified discretion is indeed more questionable than to exclude judicial review, in explicit terms, of the conduct of an authority with narrowly defined powers; for whereas in the latter case the authority, despite its freedom from judicial control, will no doubt seek to act within the framework that Parliament has constructed for it, in the former case the authority has what is tantamount to a statutory permit to do as it pleases.

S. A. de Smith *

cf. in another context, *Windsor R. D. C.* v. *Otterway & Try, Ltd.* [1954] 1 W.L.R. 1494.

[11] Requisitioned Land and War Works Act, 1945, s. 15; *Re Beck and Pollitzer's Application* [1948] 2 K.B. 339.

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CORRESPONDENCE

To the Editor of the *Modern Law Review.*

My Lord,

The Jus Tertii and the Right of Reply

I am grateful to Mr. Jolly for illustrating the confusion which surrounds this subject by his reply [1] to my article,[2] thereby affording me the chance to attempt to clarify one or two points.

Mr. Jolly objects, first, to my main conclusion, *viz.,* that the *jus tertii* (strictly so called) is no valid defence, and, secondly, to my view that it would not be necessary for a defendant pleading *jus tertii* to prove some particular person to be the true owner.

The latter point may logically be taken first as the first conclusion depends largely on the inconvenient results which follow if I am right on the latter point.

Mr. Jolly's objection here is that "it is trite learning that a right cannot exist independently of a legal person" and that a defendant would not, therefore, be able to plead *jus tertii* unless he were able to identify the *tertius* by name. The answer to this objection is that it misconceives the nature of the defence. It is trite learning, too, to use Mr. Jolly's phrase, that the rights of a person who is not a party to litigation can only be relevant insofar as they affect the rights of those who are parties. *Jus tertii* is not pleaded to show that X or Y or Z is the owner, but to show that the plaintiff is not the owner. As Mr. Jolly himself insists, the defence is simply a traverse of the plaintiff's title. It follows that the only fact in issue is the plaintiff's title, and one way of disproving that title is to show that a third person, *it matters not who,* is the true owner. In other words the defence is substantially lack of title in the plaintiff and not title in a third person.

With regard to the first objection, it appears, after his first assault (if I understand him rightly) that Mr. Jolly's only dispute with me is over terminology. Nothing further, therefore, need be said, except that it seems to me to be grossly misleading, and consequently dangerous, to refer to a defence as *jus tertii* when the *tertius* does not come into the picture at all.

Mr. Jolly finally accuses me of bringing an over-academic approach to the problem. With respect I am surprised at this suggestion, coming from someone with Mr. Jolly's academic achievements, and would submit that on the contrary my article was an attempt to show how the theoretical defence of *jus tertii* breaks down in practical application.

P. S. Atiyah.*

[1] 18 M.L.R. 371.
[2] 18 M.L.R. 97.
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NOTES OF CASES

Equitable Priorities and the Matrimonial Home

One of the chief difficulties of the property lawyer asked to advise on a case affecting the deserted wife's right to occupy the matrimonial home is a problem of classification: is the right of such a kind that a purchaser of the land concerned must take subject to it? In an earlier issue of this *Review* [1] Professor Kahn-Freund described this whole problem as requiring the attention of Parliament, and the recent decision of Upjohn J. in *Westminster Bank Ltd.* v. *Lee* [2] gives his plea a renewed urgency.

The case was the now familiar one of a mortgagee seeking possession of a matrimonial home against a deserted wife established there with an order made under section 17 of the Married Women's Property Act, 1882. The facts were, however, new in that (1) the mortgagee had an equitable mortgage only; and that (2) the wife had been deserted (and hence her right of occupation had arisen) *before* the date of the creation of the mortgage. Upjohn J. held (1) that the mere fact of occupation of the matrimonial home by the wife did not constitute notice of her interest; (2) that the wife's interest could be overridden by a subsequent purchaser for value without notice, even although such a purchaser took an equitable interest only, on the ground that the wife's interest was a " mere equity " and not an equitable interest in the strict sense. Accordingly he awarded possession of the house to the mortgagee.

This undoubtedly breaks new ground in the field of equitable priorities. Since *Bendall* v. *McWhirter* [3] and more especially since *Jess B. Woodcock & Sons Ltd.* v. *Hobbs* [4] it had seemed that the deserted wife enjoyed a real equitable estate in the matrimonial home, an estate for life, determinable however at the discretion of the court. With these cases in mind the well-established principles: " Where the equities are equal the law prevails," [5] and " Where the equities are equal, the first in time prevails," [6] could be taken to have been duly applied. This involved no anomalies and fitted reasonably into the existing relation between law and equity.

[1] Above at pp. 412, 415. See also Cheshire at 16 M.L.R. 1 and Crane at 16 *The Conveyancer* 323.
[2] [1955] 3 W.L.R 376; [1955] 2 All E.R. 883.
[3] [1952] 2 Q.B. 466.
[4] [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445.
[5] *Lloyds Bank Ltd.* v. *Oliver's Trustee* [1953] 1 W.L.R. 1460.
[6] *Barclays Bank Ltd.* v. *Bird* [1954] Ch. 274.

An additional refinement has however been made with the holding that the wife's right is a "mere equity." The distinction between the true equitable interest and the mere equity seems to have been drawn first by Lord Westbury in *Phillips* v. *Phillips* [7] where he said, "where there are circumstances that give rise to an equity as distinct from an equitable estate—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake—and the purchaser under the instrument maintains the plea of purchaser for valuable consideration without notice, the court will not interfere."

An equitable interest in property is an interest which entitles its owner to require the legal estate owner to give effect to his rights in that property. The classical example is, of course, the interest of the *cestui que trust*; again, an equity of redemption in land and an equitable lien on property for the repayment of money have both been held to be equitable interests properly so-called.[8] All, however, are beneficial rights.

Contrast the cases on mere equities. In *Garrard* v. *Frankel* [9] the right to set aside a lease for mistake was a mere equity; again, in *Cloutte* v. *Storey* [10] it was suggested by Neville J. that the right to set aside a voidable appointment under an equitable power was a mere equity. The authority is scanty indeed (for neither in these cases nor in *Phillips* v. *Phillips* [11] itself was it material to pronounce upon the point) but such as there is indicates that a mere equity is a right to a remedy for fraud or mistake only. The essence of the distinction is between a concrete right of enjoyment enforceable against the estate owner and the mere right to upset a transaction.

In *Westminster Bank Ltd.* v. *Lee* [12] the wife's right to the matrimonial home is classified along with the right to upset a transaction for fraud. It would seem, however, that the right of a wife who, as against her husband, has an enforceable status of irremovability in the matrimonial home, a right in many respects similar to a legal tenancy at will, a concrete right of enjoyment, is much closer in conception to the classical types of equitable interest. It would seem to follow *a fortiori* when the wife has also obtained an order under section 17.

It is submitted with great respect that the judge in this case has introduced a new and unnecessary complexity into the law affecting licences. The decision could equally well have been based on two other grounds which would not have had this effect:

(1) That the wife had no interest except against her husband

[7] (1862) 4 De G.F. & J. 208 at p. 215.

[8] *Cave* v. *Cave* (1880) 15 Ch.D. 639. This appears to be the only other reported case in which the distinction drawn has actually been applied.

[9] (1862) 30 Beav. 445.

[10] [1911] 1 Ch. 18 at p. 24.

[11] (1862) 4 De G.F. & J. 208.

[12] [1955] 3 W.L.R. 376; [1955] 2 All E.R. 883.

and his trustee in bankruptcy: *Thompson* v. *Earthy* [13]; *Bendall* v. *MacWhirter*.[14]

(2) Alternatively, that the wife had a true equitable interest, but that in his discretion the judge was prepared to make an order for possession: *Jess B. Woodcock & Sons Ltd.* v. *Hobbs*.[15]

If in addition the mortgage had been in the common form employed in *Barclays Bank Ltd.* v. *Bird*,[16] and embodied a power of attorney in favour of the mortgagee to execute a legal mortgage, the subsequent clothing of the equitable interest with a legal estate would have put the mortgagee in the virtually impregnable position of a legal bona fide purchaser.

As it is, the conception of the licence to occupy land is again subdivided. The contractual licence is apparently a true equitable interest,[17] while that arising from desertion is a mere equity even when fortified by an order under section 17.

One sympathises with the judge who is faced with the task of determining hard cases in this rapidly developing field; but the divergence of judicial opinion places a heavy burden upon the practitioner, the more so when, as in this case, the decision impinges upon the existing rules. In *Westminster Bank Ltd.* v. *Lee* [18] the rules of equitable priorities have been affected; we must now reconsider each equity anew for the purposes of priority, in the light of the decision that the deserted wife's licence to occupy the matrimonial home is to be classified with a mere right to upset a transaction.

By way of postscript, it may well be asked what object there can now be in the wife's applying for an order under section 17 of the Married Women's Property Act, 1882, for possession of the matrimonial home. Since *Westminster Bank Ltd.* v. *Lee* it would seem to operate only as a judicial recognition of her rights without affording her any additional protection.

Hamish R. Gray.

Payment of Pecuniary Legacies

A troublesome question arises where a testator has both given pecuniary legacies and left part of his estate undisposed of. Do the next-of-kin take the undisposed-of part (subject only to its rateable share of the pecuniary legacies), or do they take it subject to all the pecuniary legacies? Until the decision of Mr.

[13] [1951] 2 K.B. 596.
[14] [1952] 2 Q.B. 466.
[15] [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445.
[16] [1954] Ch. 274.
[17] *Errington* v. *Errington* [1952] 1 K.B. 292 (C.A.), but *cf.* [1955] 3 W.L.R. 376, 382 and [1955] 2 All E.R. 883, 888.
[18] [1955] 3 W.L.R. 376; [1955] 2 All E.R. 883.

Justice Harman in *Re Midgley, decd., Barclays Bank Ltd.* v. *Midgley*, the better view, on the authorities, was that, if the undisposed-of share was subject to an express trust for sale in the will, it bore only a rateable part; in the absence of an express trust for sale, it bore all the pecuniary legacies. This view, supported by *Re Beaumont* [1955] Ch. 462, was based on the wording of section 33 of the Administration of Estates Act, 1925, as interpreted in *Re McKee* [1931] 2 Ch. 145: it was, briefly, that section 33 (2) is the only place in the Act which directs the payment of pecuniary legacies out of undisposed-of property, and that it applies only where there is no express trust for sale in the will; so that, where there is such an express trust for sale, section 33 (2) is excluded, and the pre-1925 rules apply.

Mr. Justice Harman's decision has upset that view. The rule his Lordship has adopted is that undisposed-of property always bears the whole of the pecuniary legacies. This rule is based on Part II of Schedule I to the Act which sets out the order of application of assets for payment of debts where the estate is solvent. Paragraph 1 reads:

> "Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies."

His Lordship interpreted this as meaning that in every case a fund for pecuniary legacies must be retained. Counsel's argument does not appear in the reports so far available,[1] and so it is not yet clear whether it was argued that "subject to the retention" means "subject to the retention where this is necessary."

Until the Court of Appeal have pronounced on the matter, the true rule remains uncertain. Executors are bound to seek an order of the court in almost every case, and cannot safely rely on *Re Beaumont* or *Re Midgley*.

D. C. P.

Easements—The Right to Wander and to Picnic

Certain aspects of the law of easements that one believed had been settled for over a century have been disturbed by the decision of Danckwerts J. in *Re Ellenborough Park* [1955] 3 W.L.R. 91; [1955] 2 All E.R. 38. The relevant facts are very simple.

In 1855 a vendor sold land surrounding Ellenborough Park as building plots and granted to J. P. "the full enjoyment . . . at all times hereafter in common with other persons to whom such easements may be granted of the pleasure ground . . . called Ellenborough park." This action was brought by a successor in title to J. P. to determine whether the 1855 grant created merely a personal covenant or a legal easement.

Danckwerts J. held that the grant of "the full enjoyment of the pleasure ground" meant the right "to enjoy the ground in

[1] [1955] Ch. 576; [1955] 3 W.L.R. 119; [1955] 2 All E.R. 625.

all ways in which a pleasure ground would normally be enjoyed, which would no doubt include the right to walk about on any parts not covered by flower beds and the like and to sit down in appropriate parts of the ground and possibly to picnic there." He then held this right to be capable of existing as an easement.

Before reaching this conclusion the learned judge was faced with two main arguments. First, that this alleged right did not comply with the requirement of an easement that it must benefit the dominant tenement as a tenement, and not merely confer a personal advantage on the owner of it, and secondly that a *jus spatiandi* or right of perambulation is not known to English law.

With the former of these Danckwerts J. dealt briefly, merely observing: "It seems to me that the benefit received from a right of way is necessarily a benefit to the owner or occupier of the tenement rather than to the tenement itself, though a right of support might be said to benefit the tenement as such."

From this, it is submitted, only two consequences can follow: either a right to support is one of the few rights that can validly exist as an easement, or the requirement of benefit to the tenement as such is a meaningless one. Neither alternative, it is felt, will readily be accepted.

The authorities for the second argument concerning a *jus spatiandi* are fully set out in the judgment, including Dr. Radcliffe's quotation from Paul: "You cannot have a servitude giving you a right to wander about and picnic in another man's land"; and Theobald's statement that an easement "must be a right of utility and benefit and not one of mere recreation and amusement," as well as the statement of Farwell J. in *Att.-Gen.* v. *Antrobus* [1905] 2 Ch. 188, 198, declaring that a *jus spatiandi* is not known to our law as a possible subject-matter of a grant or prescription.

However, despite this formidable weight of opinion, the learned judge declared: "There are authorities binding on me which lead me to the conclusion that the right to use a pleasure ground is a right known to the law and an easement. These are *Duncan* v. *Louch* (6 Q.B. 904) and *Keith* v. *Twentieth Century Club Ltd.* (73 L.J.Ch. 545)."

Neither of these cases is mentioned in Professor Cheshire's standard work on real property but both repay careful reading.

In *Keith's* case a vendor in 1852 sold to B several houses and granted to him "his heirs, executors, administrators and assigns and his and their lessees and sub-lessees or tenants . . . and his and their families and friends" the use of a garden adjoining the property sold. The freehold of the houses was subsequently sold by B to the defendants, and Buckley J. had to determine whether members of a residential club run by the defendants in one of the houses had a right to use the gardens or whether these members fell outside the wording of the deed. As the judge expressly

declared: "I have merely to determine . . . what is the meaning of the deed of June 25, 1852." In a careful judgment he held that the members could not be included in any of the nine categories of persons stated in the original deed and that, therefore, they could possess no rights.

Of this Danckwerts J. states: "It seems to me almost certain that Buckley J. would have refused to decide the questions depending on the construction of the deed if he had thought that no valid legal rights which could be attached to the ownership of the houses were created by the deed of 1852."

What, therefore, is held to be binding of *Keith's* case is not the decision or dicta of the judge, but an assumption that is believed to have existed in his mind.

The earlier case of *Duncan* v. *Louch* is cited twice in Gale on *Easements*; the first time as an authority for the statement that if the owner of an easement wishes it to be repaired he must repair it himself, and secondly for the proposition that proving the existence of an easement that is in fact larger than the one claimed is a valid means of claiming the lesser easement.

The case was decided by a court of four judges in 1845 and it basically concerns a claim to two easements set out in the first and fourth counts of the action. The first count claims "a certain way, from and out of the said messuage . . . through and over a certain street . . . through a certain iron gate . . . and along a certain close and into a certain erection or building." The fourth count claims the right of "passing and repassing on foot, at all reasonable times of the day . . . unto and into a certain close, and of walking there, and of passing and repassing into and upon a certain erection."

It is clear that only the words "and of walking there" in the fourth count make any reference to a *jus spatiandi*, although this fact was not considered by the court. The right to these two easements was claimed under a deed dated 1675 which contained the words: "Together with the free liberty, use, benefit and privilege for him the said P. D., his heirs, tenants and assigns . . . he, they, and every of them from time to time contributing and paying a rateable share and proportion towards repairing and amending the same."

In an earlier action in 1844, which is briefly mentioned in the report of *Duncan* v. *Louch*, the grant of 1675 was submitted and the plaintiff proved that he was the assign of P. D. and that he had used the way claimed ever since his purchase of the relevant property in 1836.

Two points were down for decision in the second action. First, which does not concern us, whether the grant of 1675 was a grant conditional upon the payment of the repairs mentioned. Secondly, as the right accepted as having been established in the earlier case was one of passing backwards and forwards over every part

of the close, and therefore greater in extent that the ones claimed in counts one and four of the present action, there existed the doubt whether in proving the larger easement the plaintiffs had proved the lesser. It was held that there was nothing objectionable to this on the grounds of variance, as the larger easement of necessity included the lesser.

On this decision, Danckwerts J. comments: "If the four judges comprising the court had thought that the original grant and the evidence of user had disclosed an attempt to impose on the land a right not recognised by the law as an easement the plaintiff's case must have failed." Further the learned judge pointed out that this case was not cited in *International Tea Stores* v. *Hobbs* [1903] 2 Ch. 165 so that he throws doubt on some of the dicta of Farwell J. in that case and does not follow them. It is on the authority of these two cases that Danckwerts J. felt himself obliged to hold that a right to walk about, to sit down and possibly to picnic can exist as a legal easement.

This learned judgment will of necessity, it is felt, cause a flutter among the footnotes and a reappraisal of accepted notions. This is indeed no bad thing; yet one can only judge for oneself whether adequate authority has been advanced for the upheaval.

D. G. Valentine.

The Meaning of "Per Incuriam"

In *Morelle Ltd.* v. *Wakeling* [1955] 2 W.L.R. 672; [1955] 1 All E.R. 708, the Court of Appeal was asked to consider the meaning of the words "*per incuriam.*" It will be remembered that it was held in *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] K.B. 718 that the Court of Appeal was bound to follow its own previous decisions, and those of courts of co-ordinate jurisdiction except where the court must choose between its own conflicting decisions or where a case, although not expressly overruled, cannot stand with a decision of the House of Lords, and finally where the court is satisfied that its decision was given *per incuriam.*

In the present action a limited company registered in Eire, but neither incorporated nor registered under the Companies Acts and having no place of business in this country, had accepted the transfer of the residue of a lease for a term of years of a dwelling-house and was seeking to sue the sub-tenants for rent that had become due after the date of this transfer. The sub-tenants contested this claim mainly on the ground that as the company had not obtained a licence from the Crown in mortmain, the lease was forfeit by virtue of section 1 of the Mortmain and Charitable Uses Act, 1888. This contention was based on the strength of *Morelle* v. *Waterworth* [1955] 1 Q.B. 1, a case decided only a few months previously by the Court of Appeal, holding that the

residue of another similar lease acquired by this same company was forfeit to the Crown.

In *Morelle* v. *Wakeling*, an attempt was made to distinguish the previous case on the ground that the present action dealt with registered land, while the previous one did not. Upon failure to succeed on this point, the only hope of the plaintiffs, or rather of the Attorney-General who appeared as *amicus curiae*, was to challenge the first *Morelle* case as a decision that had been given *per incuriam*.

In seeking to do this, several considerations were advanced:— that the circumstances of the previous case were of a very special and unusual character, as they related to the law of mortmain which is both specialised and highly technical and a matter that very infrequently comes before the courts. Secondly, that the arguments in the case had been brief, counsel for the plaintiff company having only been instructed in the afternoon before the case came on for hearing. This had led to the absence of any sufficient emphasis being placed upon the connection of the law of mortmain with the feudal conception of land tenure, or upon the fact that the Act of 1888 was a consolidating and amending statute.

It will be observed from this that the Attorney-General is tacitly accepting as the major premise of his proposition that a decision given *per incuriam* means a decision given through ignorance or forgetfulness of certain relevant facts. As his minor premise he shows that the first *Morelle* case was given through ignorance or forgetfulness of certain relevant facts, which can only lead to the conclusion that the case was decided *per incuriam*.

In considering this proposition, the court declared that to accept the Attorney-General's argument would necessarily involve the conclusion that it is open to the court to disregard an earlier decision of its own whenever it is made to appear that the court upon the earlier occasion had not had the benefit of the best argument that the researches and industry of counsel could provide. As it was further stated that "such a result would plainly be inconsistent with the maintenance of the principle of *stare decisis* in our courts," it was clear that the Attorney-General's major premise was too wide. The court then substituted its own definition of *per incuriam*, which though expressly declared to be "not necessarily exhaustive," may be worth quoting in full.

"As a general rule," it was stated, "the only cases in which decisions should be held to have been given *per incuriam* are those given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong."

Though it would be inappropriate to construe these words with the precision of a statute, it is relevant to note that the phrase

"part of a decision" must clearly mean one, or more, or all of the parts of a decision. Further, the inclusion of the two grounds "some part of the decision or some step in the reasoning" can only mean that even if a part of the decision is not demonstrably wrong, and for that reason not able to be held *per incuriam*, it may still be set aside if its reasoning is demonstrably wrong. This statement must be qualified, however, to the extent that only the steps in the reasoning that can here be considered are those arising as a result of ignorance or forgetfulness of some statute or some binding authority—any other errors of reasoning can only be rectified on appeal.

The import of this declaration is that the court has drawn a distinction between a case where no argument at all has been presented on a particular point, and one where the argument was totally inadequate. If a relevant authority was not mentioned the decision may be challenged; if it was mentioned, however cursorily, the decision must stand.

D. G. Valentine.

Jurisdiction to Annul a Voidable Marriage

Lord Goddard C.J. said recently,[1] delivering the judgment of the Court of Criminal Appeal, holding that a woman is incompetent to give evidence on a criminal charge against her former husband after she has had the marriage annulled on grounds of his impotence: "Since the decision of the Court of Appeal in that case,[2] in *Adams* v. *Adams*[3] and *De Reneville* v. *De Reneville*[4] it is, we think, settled that the courts now regard the parties to a voidable marriage before decree to be for all purposes truly husband and wife. Unless there is a decree they will live and die as married persons with all the incidents that attach to that estate. We think it clear that the reason for the incompetency applies to these persons with force *at least equal to*[5] the case of divorced persons. It would be artificial in the highest degree to apply a different rule in the two cases. It is with no disrespect that one can say that what is artificial is the old form of sentence in these cases, which in truth perpetuates a canonical fiction."

Before the decision in *R.* v. *Algar*, it may be doubted if the tendency of the courts in purely domestic cases to equate the annulment of a voidable marriage more nearly with the dissolution of a valid marriage than the annulment of a void one was as

[1] In *R.* v. *Algar* [1954] 1 Q.B. 279, 284.
[2] *Re Eaves* [1940] Ch. 109 (C.A.).
[3] [1941] 1 K.B. 536 (C.A.)
[4] [1948] P. 100 (C.A.).
[5] My italics

pronounced as it thereafter appeared. In *Re Eaves* a woman entitled to property until remarriage was held unable to recover it where her second marriage was annulled because of the husband's impotence, but the decision was undoubtedly affected by the delay of twelve years between the second marriage and its annulment, and the fact that the property had in the meantime been conveyed elsewhere. The later decision in *Re Dewhurst* [6] went the other way, and was more in line with the older case of *Re Wombwell's Settlement*.[7] On the other hand, *Adams* v. *Adams*, which held that annulment of a marriage for a wife's impotence did not invalidate a previous agreement for her husband to pay her £1 per week during their joint lives, followed the earlier case of *Fowke* v. *Fowke*,[8] and exhibited a stronger tendency to equate voidability with dissolution.

The third case cited by the Lord Chief Justice, *De Reneville* v. *De Reneville*, was one on the conflict of laws, and it is in this sphere that Willmer J. recently reached a decision [9] that points in a direction other than that exhibited in the purely domestic decisions, culminating in *R.* v. *Algar*. In *Ramsay-Fairfax* v. *Ramsay-Fairfax* Willmer J. held that the English court had jurisdiction to annul, on grounds of incapacity and wilful refusal to consummate, a marriage between persons both of whom were resident in England, although domiciled elsewhere, even although the marriage had not been celebrated in this country. In so doing he refused to follow the decision of Bateson J. in *Inverclyde* v. *Inverclyde*,[10] that nothing short of domicile would suffice to found jurisdiction in the English courts to annul a voidable marriage. Some support for his view was afforded by the later cases of *Easterbrook* v. *Easterbrook* [11] and *Hutter* v. *Hutter*,[12] although the authority of these cases on the point was weakened by the fact that the marriages with which they were concerned had both been celebrated in England. In *Ramsay-Fairfax* v. *Ramsay-Fairfax* the marriage had been celebrated in Egypt under the Foreign Marriage Act, 1892, s. 22.

The decision in *Ramsay-Fairfax* v. *Ramsay-Fairfax* will be welcomed not only for its own sake, but also for the salutary distinction which it draws between the rules for the application of substantive family law in domestic cases, and those for the assumption of jurisdiction by the English courts in cases involving the conflict of laws. It is this latter question of the jurisdiction of

6 [1948] 1 Ch. 198, a decision of Harman J.
7 [1922] 2 Ch. 298, by Russell J.
8 [1938] 1 Ch. 774, by Farwell J.
9 *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1955] 3 W.L.R. 188; [1955] 2 All E.R. 709.
10 [1931] P. 29. This decision was in fact distinguishable, since the husband was probably not normally resident in England.
11 [1944] P. 10, by Hodson J.
12 [1944] P. 95, by Pilcher J.

the English courts in the conflict of laws which presses most urgently for reassessment in matters concerning family relations.

Starting from the reasonable proposition that it is the country with which members of a family have the closest connection that should primarily determine their legal relations,[13] the English courts have established the principle that all matters of divorce are determinable exclusively by the courts of the domicile. Unfortunately, the concept of domicile has in the meantime been so artificially elaborated that in many cases it has no present connection whatever with the family or its members. The rule that every wife and child is automatically domiciled where the husband is domiciled frequently leads to their being domiciled in a country with which they have no real connection. Even the husband's connection with the country of his domicile may be limited to the fact that it happened to be the place where his father was deemed to be domiciled at the time that he himself was born.

In this situation it is warmly to be welcomed that wherever such a possibility remains the judges should place jurisdiction in matters of family law not in the courts of a domicile which may be wholly artificial, but in those of the country with which the parties have a real connection, that is to say, the country of their common residence.

Willmer J. considered at some length the argument that the foundations on residence of the jurisdiction of the old ecclesiastical courts, which administered a law of nullity common to the whole of Christendom, could not be compared with that of the Probate and Divorce Division of the High Court, administering a strictly national law of nullity, which has been considerably extended by the Matrimonial Causes Act, s. 8.[14] Here again he fortunately preferred a solution which appeared just and convenient to one suggested by analogy with a wholly different situation nearly a hundred years ago.

An important question which still remains open is that of the law applicable to suits for nullity where the jurisdiction of the English courts is founded on the common residence of the parties. This did not fall for decision in *Ramsay-Fairfax* v. *Ramsay-Fairfax*, since the law of the husband's domicile (Scotland) and that of the common residence (England) coincided, but it may be hoped that the same reasons of justice and convenience which prompted Willmer J.'s decision on jurisdiction will persuade the court in future cases to apply the law of the common residence, which is also the *lex fori*. The Matrimonial Causes Act, 1950, s. 18 (3), affords a relevant analogy by providing that, in cases

[13] Unfortunately this proposition was buttressed by much outmoded learning on the nature of a judgment *in rem*, and Lord Dunedin's much-quoted dictum about marriage not being a *res* but savouring of a *res*, in *Salvesen (or Von Lorang)* v. *Administrator of Austrian Property* [1927] A.C. 641, 662.

[14] First introduced into English law by the Matrimonial Causes Act, 1937, s. 1.

where the English court assumes jurisdiction in proceedings by a wife who is not domiciled here, the law applicable shall be that which would be applicable if both parties were domiciled here. The provisions of the Matrimonial Causes Act, 1950, s. 18 (1) and (2), were introduced by Parliament in 1937 and 1949, respectively, to mitigate the intolerable hardship caused to wives by the common law rules limiting jurisdiction in matrimonial causes by the artificial concept of domicile. If the judges are now to cease extending the application of these discredited rules, it is reasonable that they should discontinue also the insistence upon applying the law of the artificial domicile.

O. M. Stone.

Public Policy and the Purpose of Getting Married

Silver v. *Silver*[1] exemplifies the problems which arise where a marriage is entered into, not because the parties wish, or intend, to become in fact husband and wife, but because one or other covets some incidental advantage which the law attributes to a spouse.

In 1919, a German woman became attached to an Englishman whom she met in Germany. He was already married and could not obtain a divorce. They lived together in England and Germany and in 1925, with the sole object of being able to continue this cohabitation uninterruptedly in England, the woman went through a ceremony of marriage with his stepbrother, also an Englishman. By this ceremony, she automatically acquired British nationality by marriage,[2] and with it the right to live in this country where and for as long as she chose. She continued to live with her lover here until he died in 1948. During this period the only occasion on which she met her husband was when they visited the Home Office together some six months after their marriage, to declare falsely that they had cohabited for six months.

After her lover's death, the woman met a German man whom she wished to marry, and traced her husband to discuss the possibility of a divorce. Only in 1954 did she discover that since 1940 he had been living with another woman, by whom he had had three children. She then petitioned for a declaration of nullity of the marriage in 1925, on grounds of lack of consent, and apparently relied on *H.* v. *H.*[3] Collingwood J. distinguished *H.* v. *H.*, where the spurious marriage had been entered into because the woman feared what might otherwise happen to her in Hungary,

[1] [1955] 1 W.L.R. 728; [1955] 2 All E.R. 614.

[2] Under the British Nationality and Status of Aliens Act, 1914, s. 10.

[3] [1954] P. 258.

and refused to declare the marriage void, but saying that he saw no advantage in insisting upon the maintenance of a union that had been a mere travesty from the beginning, he exercised his discretion in favour of the legal wife and granted her a decree of divorce, so that she could marry the German man as she wished, and her husband might also, if so inclined, marry the woman with whom he had lived for fifteen years and adopt their illegitimate children.

It seems superfluous to suggest that the legal situation disclosed by this somewhat sordid story is unlikely to enhance respect either for the law or for the state of marriage. The principle that a woman automatically acquires her husband's nationality, irrespective of whether the marriage is real or sham, or whether she has any direct contact with the country of which her husband is a citizen, appears to have been introduced to the statute book by the Aliens Act, 1844. It opened up a two-way track of unnecessary hardship for British women who married foreigners on the one hand, and indiscriminate benefit for foreign women marrying British citizens on the other. Under the British Nationality and Status of Aliens Act, 1914, s. 10, any British woman marrying an alien automatically lost her British nationality,[4] whilst any foreign woman marrying a British subject automatically became British. It is common knowledge that the latter provision was widely used by foreign women who, for good reasons or bad, were anxious to acquire British nationality, and with it the right to remain in this country as long as they chose.

The British Nationality Act, 1948, s. 6 (2), still provides that any woman who has been married to a citizen of the United Kingdom and Colonies shall be entitled, on application to the Home Secretary (and if a British protected person or an alien, on taking an oath of allegiance), to be registered as a citizen of the United Kingdom and Colonies.[5] This registration appears to be granted automatically and without separate inquiry, and there is reason to think that the device of acquiring British citizenship by a spurious marriage, of which dissolution is quickly sought, is

[4] Even though she never left England and her children, born in this country, were British by birth. Whether she acquired her husband's nationality depended upon his national law. The British Nationality Act, 1933, somewhat mitigated the hardship by providing that such a woman should not lose her British nationality if within twelve months of the marriage she made a declaration of intention to retain it, or if she did not acquire the nationality of her husband.

[5] It has been suggested (see J. Jackson: *The law relating to the formation and annulment of marriage*, p. 196), that an alien woman marrying a United Kingdom citizen after the Act of 1948 is not entitled to be registered as a citizen here because the words of the statute are: "a woman who *has been married* to a citizen of the United Kingdom and Colonies shall be entitled . . ." There seems no reason to think that this refers to marriage before the passing of the Act.

still used by foreign women unable otherwise to obtain permission to remain here.[6]

The courts have indeed a difficult task in attempting to reach just decisions in the face of legislative provisions of this kind. On the one hand, a decree of nullity in such cases deprives the woman who has entered into such a fraudulent scheme of the British nationality to which she should never have been entitled. But this would be no deterrent in such a case as *Silver* v. *Silver*, where the woman had enjoyed British nationality for nearly thirty years, during which she wished to live here, and would be quite happy to lose it on marriage to a German. Moreover, it is hardly desirable that people should be encouraged to enter into marriages when it suits them and have them annulled at will. On the other hand, it is surely an abuse of the process of the courts for a woman who has entered into a sham marriage for the sole purpose of being able to live with another man to be solemnly granted a dissolution of this marriage because of the adultery of a husband with whom she has never lived and in whose behaviour she can have no real interest whatsoever. Surely it is time that the theory was discarded that by a ceremony of marriage a woman automatically acquires her husband's nationality. Permission to reside in this country would of necessity be granted, as of course, to wives of British citizens, but the weighty matter of nationality should await the conclusion of proper inquiries, in the interests of both public security and public morals.

O. M. Stone.

Waiver of Contractual Rights

In 1938 the Tool Metal Manufacturing Co. Ltd. (T.M.M.C.), the owners of certain patents, entered into a formal agreement with the Tungsten Electric Co. Ltd. (T.E.C.O.) whereby T.M.M.C. licensed T.E.C.O. to deal in the products protected by the patents (called "contract materials") in consideration of T.E.C.O.'s paying a royalty of 10 per cent. on the net value of all contract material used by T.E.C.O. other than material supplied by T.M.M.C. Clause 5 of the agreement provided that if in any month the contract material used by T.E.C.O. exceeded a quota of 50 kilograms T.E.C.O. should pay to T.M.M.C. "compensation" equal to 30 per cent. of the net value of the excess contract material.

The compensation provision turned out to be a very hard one for T.E.C.O. even before the war. With the war, production

[6] Evidence of the practice was given in *H.* v. *H.* [1954] P. 258, 261. There are of course many cases, of women refugees from oppression of various kinds, which invite sympathy, but it is submitted that the best solution cannot be to prefer those who show so little respect for their own integrity or the social institutions of this country as to enter into sham marriages to secure such immediate and automatic advantage.

and, consequently, the burden greatly increased. T.E.C.O. complained bitterly of it. In 1942 T.M.M.C. decided and intimated orally to T.E.C.O. that they would prepare a new agreement and, in the meantime, would not continue to demand compensation but would be content with a flat 10 per cent. royalty because the national interest required the maximum production of contract material. No compensation was charged during the war and T.E.C.O. regulated their production accordingly.

In September, 1944, T.M.M.C. submitted to T.E.C.O. the draft of a proposed new agreement (providing for the revival of compensation) but T.E.C.O. rejected it. In 1945 T.E.C.O. issued a writ against T.M.M.C. claiming damages for fraud or breach of warranty in the 1938 agreement. In formulating their claim for damages they alleged that it had been agreed that no compensation should be payable after December 31, 1939. T.M.M.C. denied any such agreement and alleged that if there were such an agreement, there was no consideration for it. By a counterclaim T.M.M.C. alleged that since 1942 T.E.C.O., in breach of their contract, had not paid royalties or compensation on the contract material they had used. They did not desire to claim compensation for the period December 31, 1939, to May 30, 1945, but asked for compensation in respect of material used since June 1, 1945.

Devlin J. found for T.M.M.C. on both claim and counterclaim.[1] There had been no contract for the final termination of payment of compensation, but only a temporary modification pending a new agreement. This arrangement—though not pleaded as such—was binding in equity upon T.M.M.C., but terminable by them upon the giving of reasonable notice. The presentation of the draft agreement amounted to notice that the arrangement was to end within a reasonable time if the agreement was not accepted. Compensation could, therefore, be recovered from June 1, 1945. This was nine months after the presentation of the new agreement and amounted to reasonable notice.

The Court of Appeal (Somervell, Singleton and Cohen L.JJ.) dismissed an appeal on the claim but allowed it on the counterclaim.[2] Following the principle of *Hughes* v. *Metropolitan Railway* [3] as interpreted by Bowen L.J. in *Birmingham and District Land Co.* v. *L.N.W.R. Co.*[4] the court affirmed that the arrangement to suspend compensation was binding upon T.M.M.C. until terminated by proper notice. But the presentation of the draft agreement was not such a notice. Draft agreements are presented not as final documents but for discussion and, as Cohen L.J. pointed out, the last letter written by T.E.C.O. relating to the draft agreement had remained unanswered. Both Somervell and

1 (1952) 69 R.P.C. 108.
2 (1952) 69 R.P.C. 108, 112.
3 (1877) 2 App.Cas. 439.
4 (1888) 40 Ch.D. 268, 286.

Cohen L.J.J. expressed the opinion that the delivery of the counterclaim on March 26, 1946, was a sufficient notice.

Unfortunately these observations were *obiter*[5] but T.M.M.C. acted upon them by issuing a writ claiming compensation for a period beginning nine months after the delivery of the counterclaim, *i.e.*, from January 1, 1947. T.E.C.O.'s defence that even the counterclaim was not a sufficient notice was rejected by Pearson J.[6] but accepted by the Court of Appeal.[7] The counterclaim was inadequate in two respects. (1) It did not purport to determine an existing arrangement but denied that there was any such arrangement. (2) It specified no date upon which waiver of compensation was to cease. Here the court followed *Canadian Pacific Railway Co.* v. *The King*[8] where it was held that there had been no revocation of a licence to maintain telegraph poles on Crown land largely on the ground that no date had been fixed by the Crown on which the revocation was to become effective.

The House of Lords (Viscount Simonds, Lord Oaksey, Lord Tucker and Lord Cohen) restored the judgment of Pearson J.[9] While it was true that the counterclaim did not purport to put an end to an existing arrangement, it did contain a clear intimation of a reversal by T.M.M.C. of their previous attitude. Where such a clear intimation was given it was not in all cases necessary to specify a date upon which the waiver would cease to operate, though equity would require a reasonable period for readjustment before the grantor would be allowed to resume his strict rights. The *Canadian Pacific* case laid down no general principle and was distinguishable on the grounds (a) that it concerned a common law licence and, unlike the present case, was not decided on equitable grounds; (b) that the Crown had written a letter indicating if the poles were not removed at once it would be necessary for the Crown to fix a date for their removal—and no such date had ever been fixed.[10]

[5] When the second action reached the House of Lords Lord Cohen observed that it was unfortunate that the Court of Appeal did not require T.E.C.O. to amend their pleadings so as to raise the equitable defence which they had successfully advanced in their arguments. This would have made the second action unnecessary.

[6] (1954) 71 R.P.C. 1.

[7] (1954) 71 R.P.C. 201; [1954] 1 W.L.R. 862; [1954] 2 All E.R. 28.

[8] [1931] A.C. 414.

[9] [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657.

[10] T.E.C.O. raised three further defences which were rejected by all three courts: (1) That clause 5 was a restraint of trade unreasonable in the public interest: but they were unable to satisfy the heavy burden of so proving. (2) That clause 5 was a penalty, but a penalty is a sum payable upon *breach* of a contractual obligation whereas the compensation was payable in pursuance of a contractual obligation. (3) That clause 5 was void under s. 38 of the Patents and Designs Act, 1907, as prohibiting or restricting the licensee from using an article supplied by persons other than the licensor. But it was held (Viscount Simonds dissenting) that the compensation provision imposed neither a prohibition nor a restriction.

Perhaps the most interesting aspect of the case is that the Court of Appeal held in the first action that the principle of *Hughes* v. *Metropolitan Railway* [3] applies to the case of waiver of a monetary obligation.[11] May we not now assume that the Court of Appeal would concur in the dicta of Denning J. in the *High Trees* case [12] that the landlord could not have recovered the rent for the war period? If so, it would appear that the rule in *Foakes* v. *Beer* [13] has no application where the debtor is expected by the creditor to alter his position irremediably in reliance on the creditor's forbearance, and he does so.

It is important to notice that the House of Lords did not decide that circumstances existed justifying the application of the principle of *Hughes* v. *Metropolitan Railway*.[3] The parties were estopped by the first action from denying that such circumstances did exist. But none of their Lordships cast doubt on this wider application of the rule. Lord Tucker, it is true, intimated that if the point had been open he would have wanted to hear argument on it, but his doubts seemed to relate to whether there had in fact been any reliance on a promise and he pointed out that the principle "must now be regarded as of general application," though it should "be applied with great caution to purely creditor and debtor relationships."

Viscount Simonds too uttered a word of caution against supposing, "particularly in commercial transactions, that mere acts of indulgence are apt to create rights," and emphasised "that the gist of the equity lies in the fact that one party has by his conduct led the other to alter his position." He added that he did not wish "to lend the authority of this House to the statement of the principle which is to be found in *Combe* v. *Combe* [14] and may well be far too widely stated." The statement of principle referred to is presumably that of Denning L.J. The main difference between this statement and that of Bowen L.J. in the *Birmingham and District Land Co.*[4] case—of which Viscount Simonds seems to approve—is that Denning L.J.'s statement is not in terms confined to waiver of contractual rights, but applies, on the face of it, to all promises intended to affect legal relations and to be acted on by the promisee. However, since Denning L.J. emphasises elsewhere in his judgment that his principle does not create new causes of action but only prevents a party from insisting on his strict legal rights, it is clear that he too is concerned only with promises to forbear. There does not appear, then, to be much difference between Denning L.J. and

[11] That there was no such previous case was the ground upon which counsel in the first action unsuccessfully sought leave of the Court of Appeal to appeal to the House of Lords; 69 R.P.C. 108, 116. The principle has been canvassed in a number of cases involving a monetary obligation, *e.g.*, the *High Trees* case itself, but in none does it appear to have been the ground of the decision.

[12] [1947] K.B. 130, 135.

[13] [1884] 9 App.Cas. 605.

[14] [1951] 2 K.B. 215.

Bowen L.J. unless importance is attached to the word "contractual."

Having regard to the informal manner in which the principle of *Hughes* v. *Metropolitan Railway*[3] may be set in operation, it is submitted with respect that their Lordships were indeed wise to exclude any element of technicality from the mode in which its operation may be terminated. Any such technical requirements, as Lord Tucker pointed out, might tend to penalise or discourage the making of reasonable concessions.

J. C. Smith

Insurable Loss of a Motor-Car

It appears that for some time now the insurance world has sought a favourable ruling from the courts on the interpretation of the word "loss" in a policy of motor insurance. The patent ambiguity presented by the word "loss"[1] gives rise to difficulties which have been acknowledged judicially; thus, Bankes L.J. said in *Moore* v. *Evans*[2]: "Mere temporary deprivation would not under ordinary circumstances constitute a loss. On the other hand complete deprivation amounting to a certainty that the goods could never be recovered is not necessary to constitute a loss. It is between these two extremes that the difficult cases lie, and no assistance can be derived from putting cases which are clearly on the one side or the other of the dividing line." Similarly, Parker J (as he then was) in *Webster* v. *General Accident, Fire and Life Assurance Corporation, Ltd.*[3] commented: "It is almost impossible to lay down any accurate test which will fit for all circumstances." The terseness of the judgment of Lord Goddard C.J. in *Eisenger* v. *General Accident, Fire and Life Assurance Corporation, Ltd.*[4] comes therefore as a surprise to the legal profession. Moreover, the decision is a reaction against the trend away from the invocation of the criminal law test which Parker J. in *Webster's* case rejected, although not entirely.

In *Webster* and in *Eisenger* both Parker J. and Lord Goddard C.J., respectively, in cases stated by arbitrators, approached the matter initially in similar fashion. In testing whether there had been a loss both their Lordships proceeded to inquire whether the property in the car as well as the possession had passed; this led

1 The most common form of policy contains the clause indemnifying the assured for "loss of or damage . . . to" the car. See Shawcross on *Motor Insurance*, 2nd ed. (1949), p. 501.

2 [1917] 1 K.B. 458 at p. 471.

3 [1953] 1 Q.B. 520 at p. 529.

4 [1955] 2 All E.R. 897; [1955] 1 W.L.R. 869. *Webster's* case was cited to the Lord Chief Justice but is not referred to in the course of a despairingly brief judgment (at p. 871). See also [1955] 2 Ll.L.Rep. 95 at p. 96, where the argument on behalf of the claimant is cited. The perfunctory treatment of the argument does less than justice to the claimant's case.

Lord Goddard C.J. further to a consideration of the distinction made in the criminal law between a larceny by a trick and an obtaining by false pretences, whereas Parker J. felt it unnecessary to consider the arbitrator's finding to the effect that there had been an obtaining by false pretences, being content to say that there had been a prima facie loss,[5] the latter specifically upheld the arbitrator's finding in *Eisenger* to the same effect. The immediate reaction to the employment of this distinction is one of considerable doubt as to the relevancy of the notion of the passing of possession with or without the property in relation to a query whether there has been a " loss " within the meaning of the particular policy before the court. The *raison d'être* seems to be derived from a passage in Shawcross on *Motor Insurance* which curiously does not appear to have been cited to Parker J. in *Webster* but is impliedly adopted by Lord Goddard C.J. in *Eisenger* as forming the basis of the latter's judgment. The passage referred to proffers the view that if the vehicle is stolen the loss is covered, but the loss of it through false pretences or conversion would probably be regarded as a loss of money and not the vehicle, and therefore not a loss insured against and not a peril insured against.[6] The facts in *Eisenger* afford ample illustration of the cogency of this argument. Indeed, on first impression there appears much force in the argument put forward in Shawcross as judicially approved by Lord Goddard C.J. The facts in *Eisenger* were as follows:

> The claimant was approached by a man with a view to the sale of his car. After a trial run the claimant, despite remonstrances by his wife as to the advisability of the transaction, accepted in exchange a cheque for £745. Two days later the claimant learnt that the cheque was valueless.

The arbitrator found as a fact that there had been an obtaining of the car by false pretences and that therefore the property as well as possession of the car had passed. Lord Goddard C.J. accepted this finding and as a corollary held that there was therefore a loss of the proceeds of sale only.

On the question of the applicability in the realm of the civil law of the distinction used in the criminal law one is involved in a *circulis inextricabilis*. In the field of criminal law it is necessary to determine whether the facts support the notion of a parting with the property or not, in order to arrive at a decision as to the precise nature of the offence, *i.e.*, obtaining by false pretences or larceny by a trick. When transferred to the civil law the process is reversed. The crime is ascertained in order to determine the

[5] At p. 531. It could be said that in putting the case in this way Parker J. was not discarding the criminal law test; it is true that he was employing it only to the extent that an obtaining by false pretences is a prima facie loss. His illustration (p. 530), the facts of which were almost identical to those in *Eisenger* and upon which he arrived at a similar result to Lord Goddard C.J., indicates that he was not prepared wholly to overthrow the test.

[6] At p. 502.

question whether property has passed, yet to state the offence is to have determined the point to which one is attempting to reach. If for no other reason, therefore, the test should not be invoked in situations where two innocent parties are involved. To some extent this has been achieved in relation to the Factors Act, 1889, where the criminal law test has been expressly jettisoned.[7]

Secondly, even were the test apposite, the corollary deduced by Lord Goddard C.J. appears to be a non-sequitur. Even supposing that the property passed, the fact that the cheque at the time of its passing to the payee was not intended to be met on presentation cannot mean that the ostensible payee has lost the proceeds of sale. The fact of the matter is that he has never had the proceeds of sale but has been merely the possessor of a worthless scrap of paper. The future realisation that the cheque is valueless relates back to the time of the transaction. In such circumstances what has been lost is the car, for the claimant would not have parted with the car had he known the true nature of the transaction. Where, of course, the intention that the cheque shall not be met occurs posterior to the transaction, the position might be otherwise. It might be possible in this instance to assert that there was a loss of the proceeds of sale.[8]

The duty of the court, it is submitted, is to determine what the parties to the contract intended with regard to the scope and extent of the clause. It is idle for an insurer to plead that the claimant has been negligent in his dealing with the rogue, for the very nature of insurance is to seek indemnification against such occurrences. Only where the claimant has been fraudulent can liability under the policy be avoided. So long as the decision in *Eisenger* prevails insurance companies will be able to avoid indemnifying insureds in a large number of cases which are barely distinguishable from cases of identical situations depending on the nature of the thief's offence. On the basis that *Eisenger* is wrongly decided, any other argument put forward on behalf of the insurers can be countered by the courts employing the maxim: *Verba chartarum fortius accipiuntur contra proferentem*.[9]

L. J. Blom-Cooper.

Charterer's Liability for Safety of Port

The Court of Appeal, in *Compania Naviera Maropan S/A* v. *Bowaters Lloyd Pulp and Paper Mills, Ltd.* [1955] 2 Q.B. 68,

[7] *Pearson* v. *Rose & Young* [1951] 1 K.B. 275; *Du Jardin* v. *Beadman Bros., Ltd.* [1952] 2 Q.B. 712.

[8] Parker J.'s arrival at the similar result is likewise faulty on the grounds of failing correctly to analyse the transaction.

[9] *English* v. *Western* [1940] 2 K.B. 156; *cf.* in marine insurance the clause may be construed against either party: *A/S Ocean* v. *Black Sea & Baltic General Insurance Company, Ltd.* (1935) 51 Ll.L.Rep. 305.

has cleared up an important and long debated point—who is responsible for damage suffered by a ship that is ordered to a port that turns out to be unsafe? Is it the shipowner or the charterer? Normally, said the court, it is for the charterer to make good the damage.

In this case, Bowaters chartered the *Stork*, the plaintiffs' ship, to carry a cargo of logs from Newfoundland to England. The logs were to be taken aboard at Tommy's Arm, a narrow arm of the sea where the ship's bows were held by anchors and her stern was moored to an island. These conditions had been accepted in practice for a long time, but before the arrival of the *Stork* only one ship of comparable size had entered Tommy's Arm. The master of the *Stork* doubted whether his ship would be safe there, for when moored as described very little water remained between her and the rocks which rose on either side. The local pilot, however, a man of great experience, reassured the master in "picturesque," but not reported, language that the port was safe. So the master took his ship in to Tommy's Arm, but on the third day, in a gale, the *Stork* dragged her anchors and was driven on the rocks and damaged.

The owners, in suing the charterers, based their claim on the terms of the charterparty, the "Pulpwood Charter—From Newfoundland and Eastern Canada," described by Singleton L.J. as "an extraordinary document, to say the least." The words, however, on which the court, which affirmed the judgment of Devlin J., based its judgment were sufficiently common for the decision to be capable of general application.

According to the charterparty the ship was to proceed to not more than two "approved loading places as ordered. . . . Charterers have the right to order the ship to load at two safe berths or loading places." A specious defence by the charterers, who contended that there was, in view of the wording of the document, no duty to provide a safe port, was quickly disposed of by the court and requires no further consideration. The court held that safety was implied by the terms of this charterparty, but it also held, in favour of the charterers, that Tommy's Arm was an "approved" loading place, in that it was generally accepted by the trade; on the other hand, the court came to the conclusion that for this particular ship the loading place was not safe.

This cleared the ground for the principal points in dispute: first, had the master, by yielding to the pilot's persuasion, accepted the port as safe on behalf of his owners? In the opinion of the court he had not. Secondly, what was the nature of the "safe loading place" promise? The master's dilemma, said Singleton L.J., was that he owed his employers the duty to fulfil the terms of their contract with the charterer if this was feasible, but he would not risk the loss of his ship; yet if he refused to go to the port to

which he was ordered he might involve his owners in litigation over the loss of freight. The mere entering port could not be regarded as acceptance of danger, as the charterers contended, for, as Morris L.J. pointed out, to construe the obeying of orders in that way would, if correct, be highly inconvenient to all concerned; it might mean that every ship, before obeying an order by the charterer, would have to send an advance party and report on the safety of the port. In the present case the master had been persuaded by the pilot that the loading place was safe, but he had remained apprehensive and had not deliberately accepted the risk.

In construing the words "safe loading place" the charterers relied on *West, Ltd.* v. *Wrights* (1935) 40 Com.Cas. 186, where a ship had been ordered alongside a wharf where it took the ground at low tide and was damaged, and where it was held that the person ordering the ship to the wharf—in that case the consignee and not a charterer—was not liable. The charterers also referred to the majority decision in an Australian case—*Reardon Smith Line* v. *Australian Wheat Board* [1954] 2 Lloyd's Rep. 148.

The Court of Appeal, however, upheld the owners' claim, which was based on *Grace & Co.* v. *General Steam Navigation Co.* [1950] 2 K.B. 383. The words "safe port," it was held, are not a condition precedent, failure of which entitles the ship to disobey the order, but gives it no claim for compensation once failure is waived by entering the port. In fact, said the court, the words constitute a warranty, so that the charterers are liable to the owners in damages, to be determined according to both limbs of the rule in *Hadley* v. *Baxendale*. At the same time, the ship must not enter a port which owners or master know to be unsafe, for to do so would be a breach of the duty to minimise the damage. It seems, therefore, that *West* v. *Wrights* has been overruled, for Morris L.J. said in conclusion that unless the two cases were distinguishable he felt unable to follow *West's* case. In the writer's opinion there is no distinction.

The decision of this point of law is welcome, for the construction of the words "safe port" in a charterparty as a condition precedent, and not as a warranty, was somewhat artificial and not in accordance with the ordinary meaning usually ascribed to words in this type of contract. Previous discussion of the problem had been bedevilled by the introduction of the guilt factor, by the fact that it was asked who—charterer or owner—was in the circumstances best able to judge whether a certain port or berth was safe. It is curious that this should have been so, since in the general law of contract the breach of one of the terms of a contract does not normally depend on the guilt or innocence of one of the parties, and there never seemed to be any valid reason why different considerations should apply to the contract of affreightment.

O. C. Giles.

Subordinate Legislation and Injunctions to Ministers

Before the Crown Proceedings Act, 1947, an injunction would lie against a Minister of the Crown in his personal capacity if he committed a civil wrong; it would never lie against the Crown; but whether the courts had any jurisdiction to issue an injunction against a Government Department or against a Minister acting in his official capacity was uncertain. In *Hutton* v. *Secretary of State for War* (1926) 43 T.L.R. 106 Tomlin J. held that they had not, but there were other decisions, of doubtful authority, going the other way. Yet it was settled law that mandamus could issue to order a Minister to perform a public duty, other than a duty owed to the Crown, imposed on him by statute; and if mandamus could issue, why could not a mandatory injunction, or a prohibitory injunction to restrain him from acting *ultra vires*?

The Crown Proceedings Act left unaffected the law on proceedings against a Minister in his private capacity; it reaffirmed the rule that no injunction will lie against the Crown (section 21 (1)); and it provided that no injunction shall be granted against an officer of the Crown if the effect of granting it will be to grant relief against the Crown which could not have been obtained against the Crown directly (section 21 (2)). This left unresolved the question whether a party could ever obtain an injunction against a Minister in his official capacity by establishing that he was acting not as a Crown servant but as an officer directly charged by Parliament with specific responsibilities affecting private interests.

In *Harper* v. *Secretary of State for Home Affairs* [1955] Ch. 238 (noted at p. 281, *ante*), an attempt to restrain the Secretary of State from presenting a draft Order, which had been approved by both Houses of Parliament, to Her Majesty in Council failed, mainly on the ground that the Order was *intra vires*. During the course of his judgment Sir Raymond Evershed M.R. expressed doubts whether in any event an injunction would have lain against the Secretary of State, having regard to the provisions of the Crown Proceedings Act. His Lordship's doubts would appear to have been well founded, for the plaintiff was in effect seeking an injunction to restrain the Crown from making an Order in Council (*cf.* Crown Proceedings Act, s. 21 (2)). The problem remained whether the same considerations would necessarily apply if an injunction were sought to restrain a Minister from making a statutory order in his own name. In *Merricks* v. *Heathcoat-Amory and the Minister of Agriculture, Fisheries and Food* [1955] Ch. 567 the plaintiff moved for a mandatory injunction against Mr. D. Heathcoat-Amory, both in his personal capacity and in his capacity as Minister, ordering him to withdraw the draft of a potato marketing scheme made under the Agricultural Marketing Act, 1931, and already laid by him before both Houses of Parliament for approval; and for a

prohibitory injunction restraining him from seeking the approval of the scheme by each House and from making a statutory order approving the scheme. The plaintiff contended that the scheme was *ultra vires*; but he was defeated *in limine* on the ground that the court had no jurisdiction to award the relief sought. Upjohn J. held that the defendant was acting throughout "in his capacity as an officer representing the Crown," and was not acting in a private capacity or in the capacity of a designated officer who was not representing the Crown. He found it difficult to conceive of any legislative scheme in which a Minister could fall within this last category. On the further question, whether the court had any jurisdiction to interfere, and if so whether it would be proper to interfere, with the course of parliamentary proceedings upon an order, his Lordship confined himself to saying that he saw "much force in the arguments put forward by the Attorney-General; but in this delicate and difficult branch of the law it is much better not to express an opinion on any matter which does not directly arise for decision." [1]

Even if the plaintiff had adequate *locus standi* (a matter that is not considered in the judgment), it is surely inconceivable that he could have obtained the relief he sought. There is no precedent for judicial intervention requiring a member of Parliament to follow a prescribed course of action in his capacity as a member, or for preventing either House from considering a matter of which it is already seised. In *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171 the court intervened before the impugned scheme had come before either the responsible Minister or Parliament; in *Harper's* case, where the court refused to intervene, each House had already given its approval to the draft Order. The plaintiff in the present case was asking the court to interfere directly with legislative proceedings in Parliament. To lay down principles of public policy that may help to define the boundaries between the functions of Parliament and the courts in matters of subordinate legislation is not easy, but it seems clear that a serious constitutional issue would have arisen had the court intervened in this case. It may be added that although the Minister could have withdrawn the draft scheme from the House of Commons, he could not have moved to withdraw it from the Lords.

[1] In *The Times* report of the argument in the case (May 4, 1955) the following passage appears:

The Attorney-General: This court was being asked to affect the conduct of a member of Parliament in Parliament by granting these injunctions. Attempting to influence the conduct of a member of Parliament in Parliament by any kind of threat was clearly a breach of the privilege of Parliament and punishable as a contempt. In the old days those who attempted that kind of thing were dealt with, and one could find instances where counsel and their clients had been summoned to the Bar of the House and dealt with for contempt.

His Lordship: Are you threatening me? Or whom are you threatening?

Counsel: I am not threatening anyone. I am merely adverting on what happened in the old days.

Upjohn J. did not expressly state that there were no circumstances in which an injunction could be awarded against a Minister in his official capacity. Unless, however, a court is prepared to draw analogies with the law of mandamus and to impute a somewhat artificial duality to the official functions of Ministers, there is little prospect that this relief will ever in fact be granted to a party aggrieved by an *ultra vires* act performed by a Minister *qua* Minister. This is unfortunate, for although the public interest may suffer if a court injudiciously exercises a discretion to award an injunction against a Minister, it will certainly suffer if the courts consider themselves to be invariably precluded from awarding against Ministers the most effective form or relief for parties whose interests are or are about to be injured by unlawful conduct.

S. A. de Smith.

The Actus Reus in Criminal Attempts

The answer to the question whether an act amounts to a criminal attempt is, in the English authorities, discussed in terms of "proximity" to the crime intended, and it has been said that no abstract test can be formulated to determine whether the act is sufficiently "proximate." [1] Sir John Salmond, however, suggested [2] a test which Professor Glanville Williams has labelled the "equivocality" theory.[3] In a judgment in the New Zealand Court of Appeal [4] Salmond J. applied this test to determine whether or not an act was sufficiently proximate to constitute an attempt.

In view of Professor Williams's assertion that Salmond J.'s theory, while not having received judicial support in England but, having been approved in Archbold, "is perhaps in a fair way to official adoption," [5] the effect of its application in *Campbell & Bradley* v. *Ward* [1955] N.Z.L.R. 471 is important as showing the unfortunate results to which it may lead.

Salmond J., in *Barker*, formulated the test as follows:

> An act done with intent to commit a crime is not a criminal attempt unless it is of such a nature as to be in itself sufficient evidence of the criminal intent with which it is done. A criminal attempt is an act which shows criminal intent on the face of it. The case must be one in which *res ipsa loquitur*. An act, on the other hand, which is in its own nature and on the face of it innocent is not a criminal attempt. It cannot be brought within the scope of criminal attempt by evidence *aliunde* as to the criminal purpose with which it is done.[6]

[1] See, *e.g.*, Kenny, *Outlines of Criminal Law*, 14th ed., p. 82.
[2] Salmond, *Jurisprudence*, 10th ed., pp. 387, 388.
[3] Glanville Williams, *Criminal Law. The General Part*, p. 483.
[4] *Barker* [1924] N.Z.L.R. 865.
[5] *Op. cit.*, p. 483.
[6] *Barker* (*supra*), p. 874.

Elsewhere in the judgment, an act meeting this requirement is referred to as *actus loquens*.

The facts in *Campbell & Bradley* v. *Ward* were as follows. E., on returning to his motor-car which had been left unattended, saw a man, McCallion, emerging from the front seat. McCallion ran off and entered another car which was standing nearby with its engine running and in which were the two appellants, Campbell and Bradley. E. jumped on the running board and, after a struggle, succeeded in pulling McCallion out. The car, with the two appellants in it, drove off down the road. It subsequently returned but was not stopped and the appellants were not arrested until later. They were charged, together with McCallion, with an attempt to steal a battery from E.'s car. Bradley made a statement in which he said that he and his companions had "agreed that it would be 'a good idea' to get a battery, and McCallion tried to get into several cars for that purpose, and with the subsidiary purpose of getting a radio for Campbell." Campbell also made a statement to the effect that McCallion had attempted to get into cars with the intention of stealing anything he could (without specifying either a battery or a radio) and he further admitted that it was their intention to share in anything that was taken. McCallion apparently also made a statement which was, of course, inadmissible against either of the appellants. All three were convicted by a stipendiary magistrate and Campbell and Bradley appealed.

F. B. Adams J. held, on appeal, that he was bound by a statement of the New Zealand Court of Appeal in *Yelds*,[7] to consider not only the proximity of the act, but also whether it was *actus loquens*; that is, he had to apply, in Professor Williams's terminology (which the learned judge adopted), both the proximity[8] test and the equivocality test. Salmond J. had originally formulated the equivocality theory as a means of determining whether or not the act was sufficiently proximate, but F. B. Adams J. held that

> His [Salmond's] view that the latter is exhaustive has been authoritatively rejected.

This note is not concerned to discuss this rather curious result nor how the law of New Zealand has arrived at it, but is concerned only with the effect of the application of the equivocality test. That test must now be applied in New Zealand, not merely as a means of determining whether or not an act is sufficiently proximate but as a separate and additional test to determine whether an act (sufficiently proximate) may constitute an attempt. This fact

[7] [1928] N.Z.L.R. 18.

[8] s. 93 (2) of the Crimes Act, 1908, *viz.*, "The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law," is expressed in terms of remoteness, but this was taken by the learned judge as being equivalent to the rule expressed in terms of proximity.

throws into striking relief the differing consequences that flow from the application of each test.

The learned judge said that, if he were free to apply the "proximity" test without qualification, he would have had no hesitation in holding, as against the appellants, that McCallion's conduct was sufficiently proximate to constitute an attempt to steal whatever was to be stolen. With the necessary proof of intent he would then have held that his conduct amounted to an attempted theft, leaving only the further question whether the appellants were parties to the attempt within the meaning of section 90 of the Crimes Act, 1908 (which codifies the law relating to parties). But as he held himself bound to decide also whether the acts of McCallion were unequivocal as to the crime intended and as, on the evidence, those acts were necessarily equivocal, the appellants' statements being inadmissible to settle the equivocality, he held that the appeals must be allowed.

The difficulties flowing from the qualified adoption of Salmond J.'s test were expressed by the learned judge as follows:

> In the first place, as explained above, it [the equivocality theory] may exclude overt acts that are proximate, and are proved *ab extra* to have been done with the necessary intent. In the second place, it precludes resort to extraneous evidence for the purpose of identifying the particular crime intended. To take Professor Glanville Williams's illustration of the masked man found in an enclosed yard at night, the question whether he was attempting burglary or arson—or, indeed, whether he was contemplating any crime at all—though unequivocally resolved by his confession, may be capable of being resolved without resort to such extraneous evidence; and, the overt act being equivocal, our law as it stands prohibits conviction on any charge of attempt, no matter how clearly a specific criminal intent may be proved by subsequent confession or other extrinsic evidence of intent.

And he added:

> In those circumstances, though the court knows full well as against both appellants that it was theft that was contemplated, it is impossible to convict them of attempted theft. Accordingly, the convictions for the attempt cannot stand. If this be regarded as unsatisfactory, the remedying of it seems to rest with the legislature.

An earlier case, *Moore*,[9] in which the New Zealand Court of Appeal applied Salmond J.'s test, has been held up by Professor Glanville Williams [10] as a warning to other jurisdictions. F. B. Adams J., in the instant case, expressed the opinion that the decision in *Moore* might well have been the same on a simple application of the proximity rule, but if further warning is needed, in view of the

[9] [1926] N.Z.L.R. 974.
[10] *Op. cit.*, p. 485.

possibility of Salmond J.'s theory being accepted elsewhere than in New Zealand, *Campbell & Bradley* v. *Ward* may be offered as a substitute.

P. B. A. Sim.

Invitees—Notice of Unusual Dangers

To the formidable list of common law judges who have rejected the principle upon which the majority of the House of Lords decided *London Graving Dock Co., Ltd.* v. *Horton* [1951] A.C. 737 all the members of the Irish Supreme Court may now be added. A Note on the contrary and novel opinion of one Irish judge, Kingsmill Moore J., in *Long* v. *Saorstat Continental Steamship Co., Ltd.* (1953, still unreported) appeared in these pages last year: vol. 17, pp. 160–2. Now in *Maguire* v. *Pacific Steam Navigation Co., Ltd.* (1955, unreported as yet) the Irish Supreme Court has unanimously adopted and applied this opinion.

In the latest case M., the plaintiff, was a docker, employed by a firm of stevedores, whose duty was to help in unloading the cargo of a ship belonging to the defendants. While M. was engaged upon this work part of the cargo fell on him and caused him substantial injuries. A net which the defendants had erected to guard against such an event proved ineffective. The facts found by the jury, that the cargo constituted an unusual danger, and that the defendants knew or ought to have known of it, were not contested in the Supreme Court. The findings that M. was not himself negligent and that he had not voluntarily accepted the risk of injury were confirmed on appeal. But the Supreme Court did hold that the finding that M. did not know of the danger could not stand. Given then that the plaintiff knew of the danger, the very same problem which confronted the House of Lords in *Horton's* case was now before the Irish Supreme Court. As the Chief Justice said: "The question to be considered is whether an invitor can be held liable in tort for injury caused by the dangerous state of his premises of which he knew or ought to have known to an invitee who though sciens was neither volens nor careless of his own safety." He noted that the majority of the House of Lords in *Horton's* case held that the invitee's knowledge of the unusual risk exonerated the occupiers from liability for the damage sustained by the invitee. But he preferred to adopt the contrary opinion of Kingsmill Moore J. in *Long's* case, *supra*. Applying this principle to the facts he held that the shipowners, as occupiers, had failed to use reasonable care to prevent damage to the plaintiff. Accordingly, under the principle of *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274, the shipowners were liable to the plaintiff. Lavery, O'Daly and Maguire JJ. concurred. Kingsmill Moore J., of course, agreed with this judgment, but took the opportunity of restating his view of the relevance of notice:

> "Notice of the danger given to the invitee, or knowledge of the danger acquired by the invitee, does not necessarily provide a defence to the owner of the premises on which the accident occurred. Ordinarily, when such notice or knowledge enables the invitee to avoid the danger, while effectively carrying out the task which he is invited to perform, a defence will be provided for the owner; but where the notice or knowledge does not enable the invitee to avoid this danger, if he is effectively to carry out his task, then such notice or knowledge is not in itself a defence, though it may form an element in other defences, such as *volenti non fit injuria* or contributory negligence."

The problem in question has been considered recently by the English Law Reform Committee: see their *Third Report* on *Occupiers' Liability to Invitees, Licensees and Trespassers*, 1954, Cmd. 9305, paras. 14–23. At para. 77 of the majority report the widespread dissatisfaction with the relevant ruling in *Horton's* case is expressed in strong terms:

> "Our first reservation . . . concerns the effect of full knowledge and appreciation of the nature and extent of the risk as a bar to any action by the injured invitee. We feel that in some cases an absolute bar on this ground is liable to work injustice, and indeed that it actually did so in *Horton's* case. We think that even with this degree of knowledge the invitee should be entitled to succeed if it is shown that in all the circumstances of the case he acted reasonably in entering, or in using, or continuing to use, the premises notwithstanding the existence of the danger."

The Law Reform Committee's positive recommendations, in paras. 78 (vii) and 95 (vii), are more detailed:

> "The fact that a visitor has knowledge (whether due to warning by the occupier or otherwise) of some particular danger should not in itself discharge the occupier from liability to the visitor for any damage arising from that danger, but—
>
> (a) the fact that the occupier has given adequate warning of the danger, or is otherwise aware or has reasonable ground for believing that the visitor knows of the danger, should be a circumstance to be taken into account (in addition to all other relevant circumstances) in determining whether, in relation to that visitor, the occupier has discharged the common duty of care so far as that danger is concerned;
>
> (b) where the occupier has warned the visitor of any such danger, and the nature of the danger, the terms of the warning and other relevant circumstances of the case are such as to make it reasonable to hold that by such warning the occupier intended, and was or ought to have been understood by the visitor as intending, to attach to his invitation or permission a condition to the effect that the visitor was to assume the risk of any damage to himself which might result from the danger to which the warning related, it should be open to the court to

hold that a condition to that effect had been attached to the invitation;

(c) where the visitor has knowledge of the danger, his knowledge should be taken into account as a circumstance relevant to the question whether any damage sustained by him is wholly or partly the result of his own fault."

So, at present, Irish law, as laid down in *Maguire's* case, diverges from English law, as laid down in *Horton's* case, on this particular point, to the advantage of the former—as argued in the previous Note. The ratio decidendi of the Irish Supreme Court in *Maguire's* case should add weight to this particular recommendation of the Law Reform Committee when the larger question of occupiers' liability to visitors comes before Parliament.

F. E. Dowrick.

EDITORIAL NOTE

Re Spensley's Will Trusts [1952] 2 All E.R. 49, noted at Vol. 16, p. 95, was reversed by the Court of Appeal: [1954] Ch. 233.

Re Delhi Electric Supply and Traction Co., Ltd. [1954] Ch. 131; [1953] 3 W.L.R. 1085, C.A., noted at Vol. 17, p. 167, was affirmed by the House of Lords, *sub nom. Government of India* v. *Taylor* [1955] A.C. 491.

Morelle v. *Waterworth* [1955] 1 Q.B. 1, C.A., noted at p. 78, *ante*, has been followed and applied by the Court of Appeal in *Morelle* v. *Wakeling* [1955] 2 W.L.R. 672; [1955] 1 All E.R. 708, and *Att.-Gen.* v. *Parsons* [1955] 3 W.L.R. 29; [1955] 2 All E.R. 466.

REVIEWS

Civil Liberties and the Vinson Court. By C. Herman Pritchett. 297 and xi pp. with index. The University of Chicago Press. 1954. [England: Cambridge University Press.]

This book is in effect a continuation of Professor Pritchett's earlier study "The Roosevelt Court" which attracted a good deal of attention, by no means all of it of a favourable character, when it appeared in 1948. The author is not a lawyer but a sociologist. He is, however, aware that he is not equipped to discuss legal problems on a technical basis and it is but seldom that he gets into difficulties. His method of approaching his subject is to study the individual reactions of the justices of the Supreme Court to the various problems which are brought before them for decision. That court is concerned with policy making; legal policy admittedly, political social policy in fact, though not always admittedly. In policy making the temperament of the judge, and his philosophy of life, are decisive factors. This has been generally accepted since the time of Holmes—indeed Judge Jerome Frank and his school go further and regard the personal approach of the judge as the essential element in all case deciding. Professor Pritchett's important contribution to this discussion is that he attempts, by the detailed examination of a whole series of cases which have been before the Supreme Court, to analyse the way this factor operates. He even goes so far as to provide statistical analyses of the alignments of the different justices in groups of cases where the decisions were not unanimous—and one of the most significant facts which he brings out is that since the time of Holmes there has been a remarkable increase in the number of non-unanimous decisions handed down, amounting in some terms actually to no less than 80 per cent., and the present generation of justices have been much less ready to give up their personal views, and to concur with judgments as to which they felt doubt, than were the justices of earlier times. The use of these statistical methods was rather sharply criticised by some reviewers of "the Roosevelt Court," and in the present volume the author does not make such extensive use of them. Personally I am sorry for this. In the earlier volume it was interesting to observe how a justice like Stone would react as between political and economic liberty; his judgments being more left in the former type of case than in the latter: comparisons of the different tables yielded many interesting results of this kind.

The present volume covers a somewhat narrower field than the earlier one, since it deals only with cases on civil liberties, which of course have greatly engaged the attention of the Supreme Court since the end of the war. Nevertheless even in the earlier volume it was with aspects of criminal, administrative, and labour law in which liberty was involved that Professor Pritchett had concerned himself so that the difference in "scope" is not so great as might at first appear. The additional concentration does enable Professor Pritchett to push his analysis rather further, which brings out that even in respect of civil liberty one aspect of the subject may evoke greater enthusiasm in a particular justice than another. Thus Jackson while on the whole occupying a position on the right wing of the court was sensitive on the subject of search and seizure in respect of which he was usually prepared to go further than the avowed libertarians Black, Douglas and Rutledge, who tended to take into account the sort of circumstances in which the right of search or seizure was being used, being much more ready to

uphold the use of these powers in support of the enforcement of a social law, *e.g.*, against bootleggers, than when directed at alleged political conspirators.

It is interesting to observe that quite half the justices who figure so prominently in these pages had spent the best part of their earlier working lives teaching in law schools. This fact, however, does not seem to influence the way they lined up. Thus Douglas from Yale and Rutledge from Iowa were fairly consistently in the left while Frankfurter from Harvard is found, during the period of the Vinson court at any rate, almost as certainly in the other camp. The last named "was destined to become one of the great puzzles of the Roosevelt court," though during the period dealt with in the present volume his position in the court had become clearer. His work and personality are certainly one of the most interesting features of Professor Pritchett's book. While at Harvard his name had been associated with that of Chafee in the struggle to uphold civil liberties, and he had been an early academic supporter of the New Deal. He had of course also been a leading disciple of Holmes. The "puzzle" with regard to him is that in these circumstances he should have become associated with the "right" wing of the Supreme Court particularly in civil liberties cases.

The actual handling of practical business does of course often lead to the development of a more conservative attitude, particularly perhaps in those whose experience has been largely academic. There may be an element of this with Justice Frankfurter. More important, however, appears to be his deliberate decision not to allow personal predilections to influence his judgments; he has become an outstanding adherent to the doctrine of judicial restraint. This has meant in the past that the judiciary should refrain from avoiding contests with the legislature and executive except in cases where the duty to do so is clear and imperative. With Frankfurter this has apparently often meant sacrificing a view which he would otherwise have given effect to in the interest of democratic principle. He has since Holmes been by temperament the most philosophic of the Supreme Court justices, and his judicial action is symptomatic of a carefully worked out system of thought. In this his work is perhaps more in line with our own conception of the work of an appellate judge than that prevalent in the U. S. A., at any rate as regards the Supreme Court.

I must not be taken to mean by this that the personal element does not play its part in the judicial process in this country; of course it does. But our courts do not have the same conception of their work being that of policy making as prevails in the American Federal Courts, at any rate in regard to constitutional matters. The English judge is concerned to apply the policy laid down by the legislature; the American judge has to construe statutes in the light of constitutional instruments and in the spirit of a somewhat elastic Supreme Court policy which has developed down the years. The American is thus a good deal freer than his English counterpart.

Nevertheless it would be interesting and indeed valuable to apply a modified form of Professor Pritchett's method to some period of our own legal history with a view to assessing how, say in the House of Lords, the development of our law, or conversely its failure to develop, has been influenced by the temperaments and philosophies of our judges. Till that has been done English judges might do worse than peruse Professor Pritchett's two volumes which could open the eyes of some of them to temptations the existence of which they had never suspected.

C.

THE AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION. By ALBERT P. BLAUSTEIN and CHARLES O. PORTER. [Chicago: The University of Chicago Press. 1954. xi and 360 pp. 41s. 6d. net.]

THE YOUNG LAWYER. By JOHN L. CLAY, M.A., JOHN B. FRANKENBURG, M.A., and JOHN A. BAKER, M.A., B.C.L. [London: Butterworth & Co. (Publishers) Ltd. 1955. 167 and 8 pp. (index). 12s. 6d. net.]

AMERICANS have always been statistically minded, and the passion which has enriched Western culture with the Gallup Poll and the two Kinsey Reports has now resulted in a survey of the legal profession in the United States, informing one of everything about the American lawyer from his income and the use of his leisure time to the fact that he must have his fingerprints checked by the F.B.I. before he can be called to the Bar. For seven years three hundred research workers under the joint sponsorship of the American Bar Association and the Carnegie Corporation spent a quarter of a million dollars producing the thousands of printed pages containing the results of their researches. "Even if easily available," writes the Director of the Survey in his foreword, "the aggregate bulk of all this material would dismay most potential readers and impose an intolerable burden on their limited time." One agrees, and is grateful to the two young lawyers who have followed the example of Sir James Frazer in his condensation of the twelve-volume *The Golden Bough*, and D. C. Somervell in his epitome of Arnold Toynbee's *A Study of History*, and embodied the results of the Survey in a single volume.

There are 202,037 lawyers in the United States, New York State heading the list with 33,206 and the fortunate Alaska coming at the bottom with only 94. As a class American lawyers are unpopular, the most generally accepted description being that of a man "who gets two other men to strip for a fight and then takes their clothes." Such a judgment will surprise the English reader, since in England the Bar is still the premier profession, arousing the admiration and respect which the French reserve for the "savant," the Irish for the priesthood, and the Germans—at least before the war—for the professional soldier. In the United States, however, it is not the lawyer but the business man who carries off the palm.

English readers will be further dismayed to learn that the majority of American judges are elected by popular vote after a campaign which has all the violence and passion of a Presidential election. They will be shocked to read of the primitive system of legal aid provided by the richest country in the world, and by the Survey's estimate that only 55 per cent. of the need for civil aid is being met, while fewer than half the counties provide counsel for the indigent in criminal cases. Another shock is the revelation of the custom—apparently generally indulged in by counsel—of revealing evidence to the newspapers before their case has reached the court. Thus two trials result, one in the newspapers, the other in the courts. Here, however, there is less scope for complacency, since we have our own scandal in the prejudicial publicity given to the preliminary hearings in criminal cases, which makes it impossible to select an unbiased jury.

Many problems, however, facing the American Bar are shared by the English profession. Women lawyers share the same unjustified unpopularity and the 5,000 who have qualified are confined mainly to office and administrative work. As in England the profession is overcrowded and great difficulty is encountered in placing law school graduates. Here, American practice is more enlightened than our own, since many law schools have established special offices with the necessary detailed knowledge and professional contacts for placing their graduates in suitable offices and chambers. American lawyers

also face an acute retirement problem. Nineteenth-century conditions made substantial saving possible, but today although the "glittering prizes" remain, high taxation has deprived them of their gilt. Limited social security schemes exist in the United States, but lawyers are debarred from participation. Nathaniel Goldstein suggests a solution similar to that adopted at the English Bar: "the projection of a limited proportion of lawyers' earnings into the future in order to escape the full impact of surtax on peak earnings." Such schemes are only palliatives, and what is needed in England as much as in the United States is a full-scale contributory pensions scheme sponsored by the professional associations, on the model of the F.S.S.U. which has been of such benefit to academic lawyers.

American lawyers play an even greater part in political life than their English brethren. The House of Commons has always had a high percentage of lawyers, but the figures for Congress are startling. From the 71st to the 75th Congresses, lawyers provided between 61 per cent. and 75 per cent. of the total membership of the Senate, and from 56 per cent. to 65 per cent. of the members of the House of Representatives. Furthermore since 1900 lawyers have accounted for a quarter of the membership of the State legislatures. As for law students, 45 per cent. of those questioned expressed an interest in future political activity. "It follows," writes Chief Justice Vanderbilt, "that the college training of this group in government, economics, and history, and in ethics, philosophy and the humanities is a matter of paramount importance to the body politic. It is equally desirable that in law school they should receive proper training in every branch of public law as well as international law, by way of preparation for a career of public life." It is clear, however, from the chapter on legal education that this is little more than a pious aspiration, since lawyers, despite the attendance of the overwhelming majority at law schools, are a profoundly uncultured group. Only 8 per cent. ever read books about poetry, art or music, while the only high figure for reading is 84 per cent., referring to those who read local newspapers! "No instructor," says the Survey, "in any class in any law school can make a reference to Plato, Aristotle, to the Bible or to Shakespeare, or even to the Constitution itself with any assurance that he will be understood. Law students are unable to think straight, or write or speak in clear, forceful or attractive English." Things are not so bad in England, but we have no cause for self congratulation in the curriculum of our law schools. Fundamentally both countries face the same problem, the need to reconcile the requirements of a liberal education with the vocational training which every law student must receive at some stage. In both countries the law schools have tried to supply both, and as a result have achieved neither. Law in American Universities is at least in theory a post-graduate study, but the preliminary requirement is not a degree, but "three years acceptable college work," the word "acceptable" being liberally interpreted. It would not be practicable to make law a post-graduate study in England, but the time is ripe for a drastic revision of the law syllabuses and a linking of the study of law with economics and the social sciences. At the ancient universities the long-established habit of future lawyers reading for a school other than law is on the decline, and more students are reading law because their parents think it a "useful degree." A widened law course might well attract the majority of those contemplating a career in politics, the public services, or industry, as well as those wishing to take up the law as a profession. Such a course might eventually fill the place once occupied by Oxford "Greats," and for which there has never been any Cambridge equivalent. American law schools have moved some way in this direction, notably Yale, but others have stultified their own efforts by overloading the syllabus with vocational subjects such as drafting, taxation, and accounting, while at the same time expanding it in the other direction to take in comparative law and economics. Despite these experiments the Survey's judgment is far from sanguine and its

conclusions are applicable as much to English as to American universities. "Much is said of the necessity of training the law student as the future judge, legislator or administrator and as the leader of worthwhile enterprises in the community. Yet in actual practice the law faculties appear to be much concerned with success in law school, less interested in success at the Bar and still less worried about problems of leadership and the good life." Much interesting and useful information can be gleaned from the Survey, but it is the sections on legal education which will be read with the greatest profit by English lawyers.

The Young Lawyer is a far less ambitious book about the English lawyer, but it fulfils a long-felt need. Teachers of law are frequently asked by their students for a book which will give them information about the means of entry, the conditions, and the prospects of both branches of the legal profession. Up to now there has been no book on the subject apart from Doctor Glanville Williams's brilliant little monograph *Learning the Law*, and this is concerned as much with legal study as with the practical side of the profession. Those who have already made up their minds to follow a legal career will also find the book useful, since it gives a concise account of how to deal with the numerous problems of procedure and etiquette which confront a young advocate or solicitor before he has learnt to "know the ropes." This book can therefore be unreservedly recommended to all "young lawyers" and aspirants to the legal profession.

Norman St. John-Stevas.

THE PUBLIC CORPORATION: A COMPARATIVE SYMPOSIUM. Editor W. FRIEDMANN. [London: Stevens & Sons, Ltd. 1954. 612 pp. £3 10s.]

This book is the first volume in the Comparative Law Series of the University of Toronto School of Law, supported by the Carnegie Corporation of New York. The first Part consists of accounts of the public corporation in thirteen countries of which six are members of the British Commonwealth, four are on the European continent, and the remaining three are Israel, the U. S. A. and the U. S. S. R. The second Part is an essay on the legal relationships of the National Coal Board. The third Part is an essay on the International Public Corporation. And the editor makes a comparative analysis in the fourth Part. All but three of the contributors are lawyers.

Law is given its broadest definition as a method of social control by which the activities and objectives of individuals, groups and nations are reconciled. In his foreword, Dean Wright finds that in this sense law is more than a characteristic of a civilised community: "It is, in truth, our only hope for survival"—a sweeping claim for a method. It is human to approach a symposium of some 180,000 words with apprehension, and to wonder how far it is valuable to attempt to bring together in one volume accounts of institutions which can share the name of public corporation only on the Procrustean principle.

Professor Sawer's chapter on Australia points to the difficulties of comparison in a restricted field when he writes that "consistent advocacy of the statutory corporation has tended to become an aspect of conservative politics in Australia—even of extreme conservatism, the conservatism of *laissez faire*." On the "unsatisfactory features" of the tests for "shield of the Crown" hitherto developed, Professor Sawer refers to "the undesirable social features of an approach to these questions influenced, consciously or unconsciously, by a view that there are 'proper' and 'improper' spheres of actions for governments." Clearly opinions change on this question of propriety but at any particular time there is an opinion or a number of opinions. Is it wrong

for the courts to reflect such an opinion? If a government interferes with the freedom of speech or of meeting or of the person, do we not condemn it precisely because we regard such action as overstepping the proper limits of government action?

Canada receives two chapters, one being general and the other on the Province of Saskatchewan. Both are interesting though rather ponderous, and the Saskatchewan account contains sentences like these: "The board of a Crown corporation is not the master of its own ship between annual meetings that a private board very frequently is. . . . The latter course would precipitate a review of the question by the Cabinet, but unless his Cabinet colleagues disagree with him the responsible Minister would have his way. . . . Customers of certain corporations admit frankly that they prefer to purchase from private industry." The essay on France is authoritative and full of information. But Professor Drago needs a new translator. He might then avoid, for example, "The *Code Civil* uses for the first time the term 'Public Corporation' with any juristic precision." This is made worse by a translation of an article in that Code which, though meant as an illustration, does not contain that term. The contribution on Germany is a concise introduction to its subject.

The editor writes on the position in Great Britain with his usual penetration. His chapter is new and yet old. It is the most recent of his various "editions" of the two articles which first appeared in the *Modern Law Review* in 1947. A few small suggestions may be worth making. First, Professor Friedmann stresses that the Comptroller and Auditor General does not audit the accounts of the nationalised industries; he might have mentioned that their affairs do, however, fall within the terms of reference of the Public Accounts Committee. Secondly, the legal liability of these corporations does not depend on inferences from sections of their Acts but on the common law principle that any statutory person is liable unless expressly exempted. Thirdly, "The rule that the Crown is not deemed to be bound by any statute unless the latter specifically stipulates to the contrary" could have been more positively stated. Fourthly, "If it is thus not easy for the courts to interfere with the substance of the exercise of the power by the public corporations, there are also considerable procedural obstacles" has to be read twice before it is realised that the two parts of the sentence have no logical connection and are a textbook example of the false conditional. Fifthly, what is meant by: "The corporations themselves may, at times, object to the liability of a ministerial direction"? Lastly, a protest must be made, no doubt too late, against "reprivatisation." There is, besides all this, one question of legal principle in which the text places me on one side and Professor Friedmann and Dr. Glanville Williams on the other. I had better be choosing my five smooth stones out of the brook and taking my sling in my hand being matched with such an adversary and such a shield bearer (a deliberate ambiguity to spread discord among the Philistines). The dispute arises over the question how far public corporations may be regarded as Crown servants. Professor Friedmann summarises my view thus: "Whether a particular corporation is to be deemed an agent or servant of the Crown must depend on the degree of its dependence on the Crown, a matter which has to be determined and interpreted by the provisions of the statute. This view finds some support in the dictum of Denning L.J. in *Tamlin* v. *Hannaford*, which implies that the Central Land Board . . . might be regarded as a servant of the Crown, and therefore protected by the immunities which the latter enjoys." The other view is that "no distinction should be made between the different types of corporations" for the purposes of legal liability. "The mere fact of a separate legal person indicates clearly enough the intent of its separation for legal purposes, from the Crown itself" and "the privileges and immunities of the Crown are a relic of the past." The strength of the first view and the weakness of the second are the same: that there are many public corporations

which the courts would undoubtedly hold to be Crown servants. There are, first, all the Government Departments or Ministers which happen to have been incorporated by statute. Secondly there are bodies like the Central Land Board, the War Damage Commission, the Commissioners of Crown Lands, the Forestry Commission, the National Assistance Board and the Tithe Redemption Commission, all of which are authorised Government Departments for the purposes of the Crown Proceedings Act. If some public corporations are almost certainly Crown servants, then, it seems to me, a distinction has to be drawn. Moreover, while there may be disadvantages to an ordinary person suing the Crown, there is the considerable advantage that the Crown has money. If the Central Land Board or other similar corporation is not a Crown servant, then I think it is a body stuffed with straw. I think it has no money. For whatever else may be said of its legal separation from the Crown, I suspect that all its property, real and personal, is Crown property.

The generally high standard is maintained in the contributions concerning Israel, Italy, New Zealand and South Africa. The chapter on Sweden is slight but as the author writes: "The conception of the public corporation as a specific form of enterprise, governed by special principles, has no place in Swedish law." The historical account in the chapter on the U.S.A. is valuable though the natural flow of ideas from writer to reader becomes sometimes impeded by sentences like: "In the longer run, it would seem that the public corporation as a federal instrumentality has been assimilated to its state corollaries. The plenitude of constitutional power for the United States to do, by means of the public corporation, whatever seems of sufficiently important public concern to induce a Congressional majority and the President to undertake it is substantially established." The chapter on India is a reprint of the Indian Air Corporations Act, 1953, with a few notes by the editor "as it proved impossible to obtain a full article on the subject by one of the Indian legal experts without unduly delaying the publication of this volume." No similar explanation appears as a footnote to the only other chapter not written by a national of the country concerned. This is the chapter on the U.S.S.R. which is by Professor John Hazard. Well though this is done, it is too full of "seems," "apparently," "the excuse was given that" to be quite satisfactory. The reader is left with a general feeling of not knowing how the device works in practice. But this is a feeling he may have after reading some other chapters. And there is no certainty that a Soviet writer would have left a different impression.

The second Part of this volume, on the National Coal Board, is full of information presented in a somewhat pedestrian manner. The writer has taken time and trouble and was formerly legal adviser and solicitor to the Board. He trudges his way through his material and it's all there, eighty pages of it, but it's mighty dull and the note that the article is an expression of the author's personal views and not those of the Board is misleading. If it be objected that the subject-matter of this book is inevitably earth-bound, the answer is to read the third Part where Mr. Clive Parry, writing in English, leads the reader through page after page of stimulating and learned discussion about the international public corporation.

So we come to the editor's comparative analysis. He writes: "The historical, political, economic and legal background, which all the contributors have stressed in their analysis of the development and function of public enterprise in their country, cannot be detached from a study of these institutions, and the comparative analysis here should be read with this reservation. Yet, out of the very diversity and—in many cases—haphazardness of these developments certain broad conclusions of great theoretical and practical significance seem to emerge." The first of these two sentences points to the almost insuperable difficulty of comparing *établissements publics* in France, nationalised industries in Great Britain, *Mifalei Yam Hamelah Ltd.* in Israel, *Ente Nazionale Cellulosa* in Italy, the Tennessee Valley Authority in the

U.S.A. and a State Trust of the U.S.S.R. Certainly they have common characteristics,

> "As hounds, and greyhounds, mongrels, spaniels, curs
> Shoughs, water-rugs, and demi-wolves, are clept
> All by the name of dogs . . ."

I am not so sure, despite the considerable interest of many of the facts assembled in these essays, that the "broad conclusions" do emerge. To complete the quotation:

> "the valued file
> Distinguishes the swift, the slow, the subtle,
> The housekeeper, the hunter, every one
> According to the gift which bounteous nature
> Hath in him clos'd, whereby he does receive
> Particular addition, from the bill
> That writes them all alike."

The several qualities, advantages, defects and failings of the corporations described and their place in the structure of the societies of which they are a part, remain largely unrevealed and the value of this file is so diminished. The reader is left with the feeling with which he may have begun: that the comparative study of institutions divorced from their social, political and economic background is not a rewarding or indeed a possible undertaking. But the book contains much information and the essays are most valuable as introductions to the forms adopted in the various countries concerned.

J. A. G. Griffith.

THE COURT OF JUSTICE OF THE EUROPEAN COAL AND STEEL COMMUNITY. By D. G. Valentine. [The Hague: Martinus Nijhoff. 1955. 273 pp. 12.50 guilders.]

On December 21, 1954, there was concluded the "Agreement concerning the relations between the United Kingdom of Great Britain and Northern Ireland and the European Coal and Steel Community." This agreement contained many unusual features. First, it was concluded in tripartite form between "the Government of the United Kingdom of Great Britain and Northern Ireland of the one part and the Governments of the States members of the European Coal and Steel Community and the High Authority of the European Coal and Steel Community of the other part." (In other words the E.C.S.C. was considered as having a sufficient degree of international personality to be able to enter into certain treaty obligations apart from its members: yet there were other obligations even in the field of coal and steel which, it seems, could only be assumed by the members of the Community individually.) Secondly, the representatives authorised to sign the agreement on behalf of the United Kingdom Government were, in addition to Mr. Duncan Sandys (formerly Minister of Supply and, at the time of signature, Minister of Housing and Local Government), Sir Hubert Houldsworth (Chairman of the National Coal Board) and Sir Archibald Forbes (Chairman of the Iron and Steel Board). Thirdly, provision was made in the agreement for "special meetings in which the United Kingdom Government, represented by one of its members together with persons discharging public responsibilities in regard to coal and steel in the United Kingdom," should meet with the Council of Ministers of the States forming part of the E.C.S.C. and also with the High Authority of the E.C.S.C. itself. International lawyers are already familiar with the inter-governmental (and even with the inter-departmental) agreement as a descendant of the original treaty concluded between Heads of State. Must they now prepare themselves for agreements between "persons discharging public responsibilities" in regard to nationalised industries in one country and another? Will such agreements be governed by international law?

All these questions and others show how important it is that lawyers in the United Kingdom should be alive to recent developments on the Continent. The appearance of Dr. Valentine's book at this time is therefore greatly to be welcomed. In writing this book Dr. Valentine had many exceptional advantages, including a fellowship at the University of Utrecht under the guidance of that distinguished lawyer, Professor Verzijl; the facilities of the Peace Palace at The Hague; the co-operation of the Legal Department of the High Authority of the E.C.S.C.; and actual visits to the court itself in Luxembourg. Dr. Valentine has made full use of these advantages and has produced a work which is a mine of information on a subject which is still new and unfamiliar to English lawyers.

A court, however, is not an easy subject to write about, especially when it is at the beginning of its career, and has, as yet, acquired no kind of tradition or assured place in the body politic. Dr. Valentine's method is to begin with some of the comments made during the debates on the ratification of the E.C.S.C. Treaty; to proceed with an analysis of the organisation, the competence and the procedure of the court; to consider next the few cases which have so far come before the court; and to wind up with a chapter (now probably only of academic interest) concerning possible future work for the court in connection with the European Defence Community and the European Political Community. While this method is generally sound, a possible defect is that it is apt to assume in the average reader a greater knowledge of the E.C.S.C. itself than is likely to exist in practice. There is believed to be still no comprehensive work on the Community as such readily available in English. For want of such a work, some of the statements made in the ratification debates seem to require more explanation than Dr. Valentine gives them. It would be interesting to know why, for instance, so learned an authority as Professor Rolin described the court of the E.C.S.C. as having been "created in flagrant disregard of the laws of international justice." A possible reason might be that the judges are not required to be lawyers (although they can, it seems, be persons who are not nationals of the States forming the E.C.S.C.). Another reason might be an unhealthy insistence upon secrecy in the court's procedure. Thus the publication of dissenting opinions is not permitted and the arrangements for publishing information about the conduct of cases, the briefs of the parties and so on seem quite inadequate. Dr. Valentine might have been able to clear up some of these points if the court had had to deal with more cases, but of the ten cases which were available for study five were withdrawn and the other five were still pending.

The reviewer's conclusions must therefore be that Dr. Valentine has produced a work which, though very valuable as far as it goes, is still essentially provisional. It is to be hoped that he will return to the subject in a few years' time to tell us how the court, and the E.C.S.C. itself, are working in practice.

D. H. N. Johnson.

Key and Elphinstone's Precedents in Conveyancing. Fifteenth edition. Volumes 1 and 2 by R. R. A. Walker, R. G. Metcalfe, E. H. Bodkin, L. R. Norris, E. J. T. G. Bagshawe, V. G. Mallett and T. A. Blanco-White, Barristers-at-Law; Volume 3 edited by T. I. Casswell, Registrar in H.M. Land Registry. [London: Sweet & Maxwell, Ltd. Vol. 1, clxxii and 1270 pp and index 197 pp.; Vol. 2, cliv and 1116 pp. and index 125 pp.; Vol. 3, xxxvi and 603 pp. and index 74 pp. (3 Vols. £15 15s. net).]

Among the modern collections Key & Elphinstone can claim to be at least *primus inter pares*, so the publication of the fifteenth edition after an interval of fourteen years is a welcome and notable event. As before, Volumes 1 and 2 deal with conveyancing generally and Volume 3 solely with registered land. Supplements are now to be issued on a more or less regular basis—a valuable step. Books of conveyancing precedents, recording as they do both the law and practice of conveyancing and enjoying almost persuasive authority in the courts, hold a special place among legal publications. Long and happy experience has taught the profession to expect a great deal from them:—clear and accurate forms, covering a wide range of transactions and achieving precisely the stated legal result, full notes on the law with references to all the relevant statutes and cases, and authoritative guidance on the best choice among alternative methods. The editors of the new edition therefore faced a formidable task, for there have been extensive changes in law and practice since 1939.

It is convenient to discuss first Volumes 1 and 2, where the law is stated as at July 1, 1953. Here the work of revising the previous edition and bringing it up to date has been well and thoroughly done. The space available in a review forbids more than illustration.

Comparison of the old and new tables of contents (the latter is clearer) shows numerous precedents omitted or amended and over 100 new ones added. Obsolescence has caused the deletion of forms concerning coal mining leases, opposition to railway bills, the restraint on anticipation and the 1925 transitional provisions; others, like building society mortgages and agreements to take electricity, go because standard forms are always employed. Planning law is now fully covered, accounting for about a quarter of the new forms; the editors hold the now prevalent conservative view of the effect of this legislation on conveyancing practice, but include precedents for those who think differently (Vol. 1, pp. 617–20). Other noteworthy additions include an agreement for employment of a research chemist (Vol. 1, p. 40); articles of clerkship in accordance with the rules of the Institute of Chartered Accountants (Vol. 1, p. 214); covenants by lessees to spend or pay fixed sums in respect of repairs (Vol. 1, p. 1012); remodelled agricultural leases and a printing of the regulations concerning "fixed equipment" (Vol. 1, pp. 1152–93); a remodelled section on Patents including a sale of "know-how" (Vol. 2, p. 519); new protective and discretionary trusts (Vol. 2, pp. 628–30); a merely precatory name-and-arms clause (Vol. 2, p. 784); and gifts to the National Trust and cancer research (Vol. 2, pp. 882, 913). The accompanying notes have been equally carefully and successfully revised and useful additions made; that on Conveyances subject to Rentcharges may be especially mentioned (Vol. 1, pp. 810–4). Here and elsewhere it is pleasant to find the retention of what the publishers rightly term "vigorous phrases from the characteristic pen" of the late Mr. F. E. Farrer, who had done preliminary revision of some titles. And, of course, apart from new matter, there is still the older material on which rested the reputation of Key & Elphinstone—to take only one example, the precedent (Vol. 2, p. 655) enabling trustees for sale to buy a house as a residence (*cf. Re Power* [1947] Ch. 572).

Indeed, having regard to their size and scope, the contents of these two volumes provide only scanty material for criticism. The general conditions of sale (Vol. 1, pp. 331–81 and see Vol. 3, pp. 381–96) might perhaps be omitted now standard printed forms are so commonly used, and the agreement to build steamships (Vol. 1, pp. 21–7) converted to one for, say, sailing dinghies. The purchaser covenanting to register title and produce a Land Certificate in one month (Vol. 1, p. 635) is likely to need an extension of time; in 1953–54 the average time for first registration was 25–35 days (Chief Land Registrar's Report, 1953–54, at p. 3). Is it so certain that a legal charge need not contain any precise statement of when the money is due at law apart from the covenant to repay? (Vol. 2, pp. 100, 105, 107). The effect

of *Weston* v. *Henshaw* [1950] Ch. 510 is misstated in Vol. 2 at p. 769—suppression of the vesting deed postponed not the settlement but the purchase (*cf.* correct statement in Vol. 3 at p. 228).

However, this admirable revision is, broadly speaking, limited to traditional conveyancing—its terms of reference have been set by the previous edition. There remains the further question of what may be termed new invention. How far should Key & Elphinstone concern itself with new methods of conveyancing, especially those principally initiated by the desire to minimise restrictions on the use of property? In the past, fertile imagination prompted by this motive has resulted in valuable developments, *e.g.*, uses and trusts, the barring of entails, and, lately, the protective or discretionary trust. Without such expedients property lawyers would not have discovered "the ultimate products of analysis" and produced "one of the finest parts of our law, in its main principles and structure . . . superior to all foreign laws dealing with the subject" (Lawson—*The Rational Strength of English Law*, pp. 77, 89). Of course no one wants to fill Key & Elphinstone with experimental conveyancing—it is a question of where to draw the line. The test, it is suggested, should relate to practice:—is the matter of such importance that the average practitioner needs information and guidance? Those responsible for the new edition have recognised the problem (Publishers' Note, Vol. 1, pp. vii, vii) but have, it is submitted, been unduly cautious and conservative in excluding at least the following matters. First, freehold flats or "flying freeholds"; whether desirable or not this type of interest is becoming more frequent and any practitioner may have to cope with the problems it raises. Second, an occupational licence for a service occupancy, to match the new service tenancy (Vol. 1, p. 1071). This particular licence has a respectable history of over 100 years (*e.g.*, *Hughes* v. *Chatham Overseers* (1843) 5 Man. & G. 54) and can hardly fall under the editorial ban of "loopholes" in the Rent Restriction Acts (Vol. 1, p. vii). Other occupational licences, though of considerable practical importance, seem still too experimental for inclusion. Third, an agreement for letting a purchaser into possession without giving him the protection of the Rent Acts if the sale goes off. Fourth, a clause settling money to be spent on the upkeep of land with a gift over if the land is sold, on terms which prevent its being void under the Settled Land Act, 1925, s. 106, as in *Re Burden* [1948] Ch. 160 and *Re Aberconway* [1953] Ch. 647. These cases are referred to in notes (Vol. 2, pp. 768, 880) but there is no precedent. Fifth, and most important, settlements designed to minimise the incidence of tax and death duties. This subject the editors regard as too specialised and liable to change for inclusion (Vol. 1, p. vii, Vol. 2, pp. 607, 757), so the notes rarely do more than warn of the existence of revenue problems. Yet these must be a dominant factor—often the dominant factor—when any settlement is contemplated whatever its principal purpose. Tax planning is a major development in post-war conveyancing. The result is that practitioners must seek guidance and precedents elsewhere and this, it is submitted, is a matter for regret. It would have been better, surely, to include a special note with some precedents; thus isolated, the section could easily have been varied in supplements if changes in the law rendered it out of date. One may indeed express the hope that supplements will in fact meet all or some of the points here taken.

Discussion of settlements prompts the suggestion that when the next edition of Key & Elphinstone is prepared consideration be given to rearrangement and consolidation of the various titles bearing on this topic. At present there are in Volume 1, Appointments (by deed, almost wholly concerned with powers of appointment), Appointments of New Trustees, Assent, Disclaimer and Disentailing Assurances, in all some 140 pages. Volume 2 contains Releases, Settlements (Personal), Settlements (Real), Wills (including appointments under powers by will), and Mr. Farrer's Note on Remoteness. Would not economy, clarity and convenience be served if all

these topics were collected in Volume 2, at present 230 pages shorter than Volume 1? It would also be helpful if room could thereby be made in Volume 1 for Mortgages (now in Volume 2) for this title requires some cross-reference to Volume 1 (*e.g.*, for parcels) and of course will often be needed in conjunction with Conveyancing and Leases. The length of Mortgages (300 pages) does however present difficulties.

Volume 3 of Key & Elphinstone, first issued with the 14th edition, differs from Volumes 1 and 2 in that it combines the functions of a work on the investigation of title with that of a collection of precedents. There is first a general discussion of the principles and practice of registered conveyancing (pp. 1–355), covering Land Registry procedure—*e.g.*, applications for first registration, the entry of notices, restrictions, etc.—as well as the ordinary conveyancing transactions. This is followed by precedents, Registry forms and, usefully, Fee orders (pp. 357–603). The form and content of this volume, initiated by the late Professor Potter, seem to be amply justified; it is the best textbook on registered land (for Brickdale is a commentary on the Act) containing learned and lucid discussion of the special problems presented by the Land Registration Act and Rules. All practitioners, experienced or not in this type of conveyancing, will find it invaluable.

In this edition the most interesting new material is the discussion of indefeasibility of title in the light of *Re 139 Deptford High Street* [1951] Ch. 884, and the editor's differences of opinion with his predecessor. In the latter instances, which are not unduly extensive, both views are given, thereby producing some stimulating passages on important points. For example, Professor Potter thought section 65 of the Law of Property Act, 1925, making execution of a conveyance by the grantee unnecessary to the reservation of an easement, inapplicable to a registered transfer (p. 139); that the Administration of Estates Act, 1925, s. 36, concerning endorsements on probates, made it necessary for a purchaser from personal representatives of a registered proprietor to obtain an acknowledgment for production (p. 279); and that despite section 74 of the Land Registration Act (providing that neither the registrar nor persons dealing with registered estates or charges shall be affected with notice of trusts, reference to which shall where possible be excluded from the register) there should be entered against trustees for sale a restriction limiting their powers to those conferred by the Law of Property Act, 1925 (p. 256). On these points the editor takes the opposite view and in so doing stresses that the registry would not require execution by a purchaser, accepts as evidence of title office copies of probate (which would not bear endorsements) and urges the entry only, against trustees for sale, of the restriction against payment of purchase-money to less than two persons (pp. 140, 279, 257). In each instance the editor's view is fully and fairly argued but it is perhaps worth remarking that the registry view, as reflected in its practice, is only persuasive though most important. Only the court can settle the law and the practitioner's task is to avoid any possibility of trouble.

One would like to see further discussion of possession and occupation as an overriding interest. *City Permanent Building Society* v. *Miller* [1952] Ch. 840 is cited three times (pp. 54, 176, 291) for the proposition that an agreement for a lease is not an overriding interest without mention of the qualification that the prospective tenant there was not in possession (see [1952] Ch. at p. 854). *Woolwich Equitable Building Society* v. *Marshall* [1952] Ch. 1, where Danckwerts J. held a prospective tenant in possession to have an overriding interest, is not cited. Nor is there any discussion of deserted wives or occupational licensees, though in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466 at p. 483 Denning L.J. said that occupation would give them an overriding interest. This is, however, a small gap in such a comprehensive survey.

To sum up; allowing for the self-imposed limits of Volumes 1 and 2,

the fifteenth edition of Key & Elphinstone should maintain and enhance the deservedly high reputation won by its predecessors. Criticism of editorial policy does not detract from, and must not obscure, the wealth of learning and experience in each of the three volumes. They will be of very great service to the legal profession.

F. R. Crane.

Patents for Inventions and the Registration of Industrial Designs. By T. A. Blanco White, of Lincoln's Inn, Barrister-at-Law. Second edition. [London: Stevens & Sons, Ltd. 1955. 542 pp. £3 3s.]

The first edition of Mr. Blanco-White's book was timely. The publication of the second edition is an event of even greater importance to all those who are in any way concerned with, or interested in, these particular branches of the law relating to monopolies.

At the date of first publication the Patents Act, 1949, and the Designs Act, 1949, had only just come into force. The second edition records with precision the changes brought about by the cases decided both before the Comptroller-General of Patents and in the High Court in the course of the intervening five years.

The author has decided views but his approach to the problems of monopoly jurisprudence is stimulating and he never fails to make it plain where he is expressing personal opinions. The course of events has inevitably brought about a need for revision of some of the propositions put forward in the first edition. It was, for example, originally suggested, that, having regard to the terms of section 37 and section 41 of the Patents Act, 1949, and Article 5a (4) of the International Convention for the Protection of Industrial Property, a compulsory licence could not be secured to work inventions relating to food and medicines until the expiry of three years from the date of sealing of the patent. This question, which became one of great importance in the rapidly developing field of patents relating to the manufacture of antibiotics, was considered in the House of Lords in *R.* v. *Comptroller-General*, 71 R.P.C. 169, when it was decided that in the medical field a compulsory licence under Letters Patent might be obtained at any time after sealing. In this, and in all other relevant cases, the text has been altered. If the reader stills feels that he may differ from the author's views on some points yet to be decided, for example the extent to which prior publications may be effective in attacking the validity of a patent of addition on the ground of obviousness, he can never be heard to say that these points, as raised, are not so raised as to indicate quite clearly that there may be a possibility of a divergence of opinion.

A new and valuable feature of the present edition, from the point of view in particular of the practitioner, is the full series of annotations to the text of each of the sections of the Acts as printed in the appendices. For each section there is given a history of the particular enactment, a note of the extent and nature of such changes as have been made from time to time and appropriate references to the Patent Rules and the text of the book. These annotations are of very real assistance and add greatly to the value of the book as a whole as a work of reference.

This is the only up-to-date work in the particular field. The whole of the enlarged and revised text is extremely readable. The manner in which the question of "patentability" is dealt with will be of assistance and interest to all those concerned in taking out patents. Further the author deals in an illuminating manner with such important questions as the construction of the specification and its validity. This work gives comprehensive guidance

on all those questions which will confront anyone who, whether through intention or misfortune, finds himself involved in patent and design litigation. If it is suggested that this work is one to be compared with the great "Frost" those familiar with the literature available at the turn of the century will not misunderstand the implications of the suggestion and will, the comparison notwithstanding, greet publication of the second edition with the greatest warmth.

J. W.

PRESTON AND NEWSOM'S RESTRICTIVE COVENANTS AFFECTING FREEHOLD LAND. Second edition by G. H. NEWSOM. [London: Sweet & Maxwell, Ltd. 1955. xxiv and 217 and (index) 9 pp. 35s. net.]

THE first edition of this monograph was published in 1939. It quickly became, and has remained, the invaluable *vade mecum* for any practitioner concerned with land subject to restrictive covenants or with the imposition of new restrictive covenants when land is being sold. Practitioners will welcome the publication of a new edition; and, as it is thought that academic lawyers are not generally aware of the great merits of this little book, this may be a suitable time to recommend it to them as containing, in a few pages, quite the best, clearest and most readable discussion of the history and progeny of *Tulk* v. *Moxhay* (1848) 2 Ph. 774.

The first edition appeared at a time when it was reasonable to hope that the then recent decision of Clauson J. in *Re Ballard's Conveyance* [1937] Ch. 473 might soon be reconsidered in the Court of Appeal. It has not been. The present edition appears at a time when many lawyers have serious doubts about the correctness of the decision of Upjohn J. in the only important recent case on this branch of the law, *Newton Abbot Co-operative Society Ltd.* v. *Williamson & Treadgold Ltd.* [1952] Ch. 286 (see, *e.g.*, the critical article by Elphinstone, "Assignment of the Benefit of Covenants Affecting Land," at 68 L.Q.R. 353). Mr. Newsom, too, is outspoken in his criticism; indeed he so far disapproves of the *Newton Abbot* decision that he expresses the view that it is desirable that it should be overruled, and, so that the text may not be encumbered with discussion of what he hopes will be a mere temporary gloss on the law, he has put his discussion of the case into an excursus at the end of Chapter 2.

It is surprising that Mr. Newsom has so little to say about *Smith and Snipes Hall Farm* v. *River Douglas Catchment Board* [1949] 2 K.B. 500, C.A.; for, although that case was concerned with a positive covenant, it is very relevant to the discussion of the benefit of any type of covenant affecting land; and it might, with advantage, have been discussed more fully in Chapter 2.

The principal change in the new edition is the addition of a helpful chapter dealing with the variation and discharge of covenants by the Lands Tribunal, under section 84 (1) of the Law of Property Act, 1925.

The decision in *Tulk* v. *Moxhay* was itself a striking and sophisticated development in the law of real property; but the use that has been made of it has not always been intelligent and has sometimes been silly. A surprising amount of land is found, in practice, to be subject, according to the title deeds, to restrictive covenants which are badly drawn, which may never have been enforceable, and which do not appear to have had any real economic value to the owners of the land intended to be benefited. Anyone with experience of registered titles knows how often the covenants entered on the register include (to take an example of silly draftsmanship) a covenant not to build a house at a smaller prime cost than £350; and, in spite of the fact

that there is no hope today of building any house at all for so small a sum, solicitors have solemnly to read through such antiquarian comics whenever the land changes hands. In the case of unregistered land the bold lawyer may simply omit to refer in the conveyance to covenants which are obviously obsolete. But, in spite of section 84 (1) of the Law of Property Act, 1925, it is likely that many titles will continue to be incumbered with wordy and worthless restrictions.

The second edition has been printed with a smaller page and a pleasanter type than the first edition. There are a few unimportant misprints: *e.g.*, on p. 6, where, in the heading which should read "Conditions in which covenants can run with the land," the word "with" has been replaced by "into"; on p. 19, where "the covenant to repair a road" is printed as "the covenantee to repair a road"; and on p. 50, where the figures 752 in a case reference have got mixed up. As a personal preference, I would like to relegate to footnotes the references to volumes and pages of the reports which now appear in the text immediately after each case that is cited.

LEOLIN PRICE.

THE LAW RELATING TO COMMERCIAL LETTERS OF CREDIT. By A. G. DAVIS, LL.D. Second edition. [London: Sir Isaac Pitman & Sons, Ltd. 1954. 207 pp. (with index). 30s. net.]

THE new edition of this book remains substantially unchanged, and little need be added to the review of it which we printed when it first appeared (4 M.L.R. p. 239). It was then warmly commended to the profession and in the regrettable absence of a new edition of the late Professor Gutteridge's book, a deficiency which it is understood will shortly be repaired, it is the only competent up-to-date treatise on the subject. The demand for it is well indicated by the fact that it was reprinted several times before the new edition was ready.

The number of English decisions directly bearing upon bankers' documentary credits which have been given since 1939 when the work first appeared could be counted upon the fingers of one hand, so from that point of view Professor Davis has not needed to make radical additions to his text. Indeed even *Bank Melli Iran* v. *Barclays Bank* [1951] 2 T.L.R. 1057 and *Rayner* v. *Hambros Bank* [1943] K.B 37 which are discussed in some detail and which gave rise to comment in banking circles at the time, involved little more than the application of well-known principles. Professor Davis has filled out his text in several of the chapters by reference to decisions in the U.S. courts which seem to handle these cases much more frequently than do ours. One of the most valuable features of this book is the full use made of the American cases which are indeed from time to time cited as authority for statements in the text which it is not possible to support clearly from the English decisions.

Considering the enormous and growing use of bankers' credits in overseas commerce this paucity of case material is strange. The intervention of the war years is no doubt a partial explanation, but I am inclined to think that it is the policy of the banks to keep these cases out of court. Mr. Megrah has shown in his Gilbart Lectures of 1951 and 1952 that there are numerous unresolved points which arise in connection with these credits—though no one comparing the two editions of this book would think that this could possibly be so.

Thus the additions made to this edition do not extend the text by more than about eight pages, which is eloquent testimony in support of my statement that there has been very little development of the law during the past fifteen years and Professor Davis has missed nothing of significance. A very

few pages have been gained by shortening the chapter on the legal relationships between seller and banker which from the legal point of view are among the most interesting in the book. Professor Davis explains that this was done out of deference to advice from bankers and to give himself space to expand the more practical chapters. The saving is so small as to be hardly worth the making, but the shortening has not in fact diminished the value of the chapter. The fact that bankers like and make use of the book is understandable, for the author has an unusual ability to explain the many difficult legal points involved in this subject in a clear, commonsense way, devoid as far as possible of technical jargon. Finally it is perhaps worth noticing that the price has risen threefold since 1939, a fact eloquent of the rise in publishers' costs during the interval.

C.

COURT OF PROTECTION PRACTICE (HEYWOOD AND MASSEY). Seventh edition by DONALD G. HUNT, of the Court of Protection, and JOHN F. PHILLIPS, LL.M., Barrister-at-Law. [London: Stevens & Sons, Ltd. xxxv and 614 (incl. index 27) pp. £5 5s.]

Heywood and Massey is a classic in the sphere with which it deals. Like many institutions of government that sphere has changed its name. When it first appeared in 1900 the sphere was entitled "Lunacy," and the volume in conformity was called "Lunacy Practice." In 1934 the name of the Department of the Master in Lunacy was changed to the "Management and Administration Department," the intention being to avoid as far as possible any reference to the word "lunatics" or "lunacy." The subsequent prevalence of referring to departments by their initials suggested that this was a case of making confusion worse confounded. Since 1947 the sphere is now known as the Court of Protection, and hence the change in the title of the book which for the first time appears without any reference to Lunacy in its name.

Heywood and Massey is one of those none too numerous works which are virtually self-contained, in so far as between two covers the practitioner has everything that is required to enable him to deal with his case, litigious or non-litigious, from start to finish without need for reference elsewhere except for further exploration of the authorities cited by them, statutes, regulations or decided cases. Edited by an officer of the court in question, and a member of the Bar, the difficulties envisaged by the department and the practitioner have been fully realised. The practice of the court is dealt with adequately in Part I of the work, which includes the procedure in the cases of Leases and the Sales of Land and other conveyancing matters, as well as the Appointment of New Trustees and Vesting Orders. Part II is entitled "Related Matters," and includes Contracts, Torts and Crimes, Administration and Probate, Marriage and Matrimonial Causes, and Legislation generally. Parts III, IV, V and VI set forth the relevant Statutory Material and Regulations, and Part VII some 130 pages of valuable Forms and Precedents which include such Conveyancing Forms as a Sale on behalf of a Patient, a Tenancy Agreement, a Conveyance, Mortgages and Legal Charges, and Appointments of New Trustees and Settlements under section 21 of the Law of Property Act, 1925. There are several valuable Court Forms and Orders, and the whole work constitutes an indispensable *vade mecum* for those who are called upon to deal with this extremely complicated subject. Considering the great range of topics dealt with, the dimensions of the book have been so carefully planned as to make it a portable volume which can be handled with ease. There is a good working index and the Publishers are to be congratulated upon an excellent piece of book production.

BERTRAM B. BENAS.

THE QUANTUM OF DAMAGES IN PERSONAL INJURY CLAIMS. By DAVID A. McI. KEMP and MARGARET SYLVIA KEMP. [Sweet & Maxwell, Ltd. 1954. 38s. 6d. net.]

EVERY practitioner who consults this work—and anyone who has to advise on quantum in a personal injury claim is now likely to do so—will feel, with Lord Justice Birkett who wrote the Foreword, that "the enterprise and industry of the authors are most praiseworthy." In "measuring the immeasurable" (as Romer L.J. put it in *Rushton* v. *National Coal Board* [1953] 1 Q.B. 495, 502) assistance can only be derived from the amounts awarded in similar cases. The difficulty hitherto has been to discover such cases; and the authors have earned the gratitude of the profession by their labours in compiling a body of cases—many of them unreported (or like *Paris* v. *Stepney Borough Council* [1951] A.C. 367, reported only on the question of liability)—which deal with the assessment of damages for personal injuries.

The book is, however, longer (and therefore more expensive) than is justified. It is unduly repetitive. It serves little purpose to reproduce judgment after judgment setting forth, in almost identical terms, the principles on which the Court of Appeal will interfere with an award of damages. One or two authoritative statements, with a footnote reference to other cases, would suffice. In their criticism of *Harris* v. *Brights Asphalt Contractors* [1953] 1 Q.B. 617 (in which Slade J. held that prospective loss of wages could only be taken into account for the period of expectation of life after the accident, and not for the pre-accident period of expectation), the authors are especially diffuse. Another example of their prodigality is the footnote on p. 15, in which no less than fifteen lines are devoted to the quotation of a passage from Birkett L.J.'s judgment in *Manley* v. *Rugby Portland Cement Co.*, 1951 (*not* 1952) C.A. No. 286, although the judgment is set out *in extenso* on pp. 334 *et seq.* The substitution of cross-reference for repetition would effect a substantial reduction in the size of this work without in the least impairing its utility.

In other respects, too, the authors, in offering the fruits of their labours, do not seem to appreciate that enough is as good as a feast—and far more digestible. No one will deny the relevance of changes in the purchasing power of the £ sterling, but all that the lawyer needs to know of this subject for the purpose of advising or arguing on quantum could easily be set out on a single page. Instead, the authors, in Appendix D, give verbatim extracts from Hansard, representing parliamentary answers given on seven occasions, and not content with tables setting out the decline in the value of the pound between 1900 and 1949, and again between 1938 and 1952, they reprint a table showing the decline *month by month* from October, 1951, to May, 1953.

One may question the relevance (in Chapter 8) of the Prescribed Degrees of Disablement under the National Insurance (Industrial Injuries) Act, 1946, to loss of amenities of life. A foot injury constituting a 5 per cent. disablement for the purposes of the Act may mean more to a keen footballer in terms of loss of amenities than the 30 per cent. disablement of an amputated thumb.

A number of minor errors call for correction in the next edition (which should not be long delayed if practitioners respond as they ought to the authors' request for reports). On p. 10, the Widows', Ophans' and Old Age Contributory Pensions Act, 1936, is referred to without mention of its repeal by the National Insurance Act, 1946. Example (5) on p. 64 is ill-phrased, and would be better expressed in percentages: for the increase of an award on appeal from £1,000 to £1,750 is proportionately greater than an increase from £2,250 to £3,250. On p. 245, for "£8,000" read "£5,000"; on pp. 390 and 417, for "£125" read "£150." In the Index, "Hysterical blindness"—under "Eye Injuries"—should refer to p. 374, not p. 219; and it could usefully refer also to p. 207, which deals with limitation of field of vision

through hysteria. The list of awards in Appendix B could be made more useful by adding in appropriate cases, after "C.A.; award affirmed," the words "but held to be too low" (or as the case may be). The omission of such comment may be misleading as regards the proper amount of an award, in view of the Court of Appeal's reluctance to interfere with damages.

It is indeed most unsatisfactory that the amount of an award should depend so much on the luck of the draw—on whether the case is tried by A rather than B or C. It is not surprising that the researches of the authors have convinced them of the necessity of some such reform as that which Lord Justice Singleton has suggested on several occasions, namely, that in serious personal injury cases three judges should sit together to assess damages.

G. Ellenbogen.

The Judicial Process among the Barotse of Northern Rhodesia. By Max Gluckman. [Manchester University Press. 1955. xxiii and 386 pp. 37s. 6d.]

This volume is greatly to be welcomed, for it gives an unusually—even uniquely—vivid picture of how an African court actually works. Not, of course, that the Barotse can be regarded as wholly typical of similar courts elsewhere, for certain features of the Barotse system as it appears in these pages seem peculiar to themselves; but much the same could be said of most indigenous systems. Yet the fact remains that as we watch these court members try their case, elicit the facts, examine the parties and their witnesses, enunciate principles of customary law, and then apply those principles to the facts at issue, we get not only a detailed picture of the Barotse court concerned, but also a tolerably accurate idea of similar indigenous processes in other parts of Africa.

It has, of course, often been remarked that an African court is not primarily concerned, when dealing with some dispute, to apply certain clear-cut rules of law, but rather to readjust the social equilibrium and reconcile the parties. One of the many virtues in Professor Gluckman's work—for which, indeed, his anthropological training particularly fits him—is the way in which he emphasises the wider scope and greater importance of this aspect of their work where it concerns a family or village dispute, with the lasting and multiple relationships necessarily involved, than is the case in regard (among the Barotse) to questions of marital discord or the breach of merely contractual ties.

Again, Professor Gluckman is more acutely aware than many anthropologists of the difference between those customs and norms which will, or may, be enforced by the courts and those which lack any judicial sanction; and he continually emphasises that custom or morality are among the sources from which the Barotse draw their law rather than identical therewith. Some idea of his jurisprudential position and use of terms may be gleaned from his definition of "law," "morality" and "legal rules," respectively. The first he sums up as "a set of rules accepted by all normal members of the (Barotse) society as defining right and reasonable ways in which persons ought to behave in relation to each other and to things, including ways of obtaining protection for one's rights" (p. 229); the second he regards as identical, with the solitary exception that he would substitute the term "generous ways" for "reasonable ways"; and the third he defines as "those rules which Lozi (or Barotse) courts ought to enforce" (p. 230). It is clear, then, that the distinction between the first two is, to him, merely one of degree, and somewhat shadowy at that; while it is the term "legal rules" which represents what the term "law" means to most lawyers. It is somewhat—though not entirely—in this sense that we read, at p. 234, that "A judge ought to abide by the law even if its application is inequitable."

One point in which this reviewer cannot altogether share Professor Gluckman's enthusiasm is the significance he finds in the recognition, among the Barotse, of a parallel to the English lawyer's concept of the "reasonable man." But is a certain vague parallel to this concept really a matter of any major significance? Surely it amounts, in fact, to no more than a regard for what an ordinary man, or an average headman, father, son or husband (as the case may be), would normally do in given circumstances—and, as such, represents a canon of judgment which is basic to human thinking, however inarticulate it may sometimes be?

The book is made up of eight chapters, together with a Table of Cases, Foreword, Preface, Acknowledgments, Bibliography, Index, Maps and Diagrams. In the Foreword Professor Arthur Goodhart welcomes this contribution to "legal philosophy" in the warmest terms. The first chapter ("Background of Litigation") gives a general description of the Barotse or Lozi; the second ("The Task of the Judges") contains a detailed report of a number of cases and an outline sketch of others; the third ("The Reasonable Man") presents material and argument to illustrate how this common law concept is basic, in Professor Gluckman's view, to the Barotse judicial process; the fourth ("Legal Rules, Customs and Ethics") comprises an interesting discussion of the mutual relations of these distinct, yet mutually related, concepts; the fifth ("Judicial Logic and the Sources of Law") includes the most important jurisprudential discussion in the whole book, coupled with an attempt to show the "basic similarities between processes of law in simple and in complex societies"; the sixth ("'Certainty' and 'Uncertainty' in Law") represents a further study of the nature of law and a defence of the thesis that "the 'certainty' of law resides in the 'uncertainty' of its basic concepts"; the seventh ("Some Comparative Implications of the Lozi Judicial Process") ventures somewhat further into the realm of general jurisprudence; and the last ("Conclusion") summarises Professor Gluckman's opinions.

Where much is so good it seems captious to criticise. The chief defects in this book, to this reviewer, are a tendency to deduce a great deal from a very little, and then to analyse and discuss this deduction at considerable length; a recurrent proneness to prolixity and repetition; and a certain propensity to moralise. Perhaps it is a sign of legal pedantry to recoil somewhat from the "distinctive titles" which have been given to many of the cases (*e.g.*, the "Case of the Dog-in-the-Manger Headman" or of the "Man who Helped his Mothers-in-Law Cross a Ford"). Be that as it may, one cannot but wonder whether, instead of the proposed magnum opus of three books—the present volume and two promised companions, devoted to "The Rôle of the Courts in Barotse Social Life" and "The Ideas of Barotse Jurisprudence," respectively—the cause of scholarship would not have been adequately served by incorporating all the material concerned, in a more concise form, in a single, comprehensive, and very valuable treatise.

J. N. D. Anderson.

Private International Law. By J. A. C. Thomas, M.A., LL.B. [Hutchinson's University Library. 1955. 170 pp. and index. 8s. 6d.]

Mr. Thomas states the objects of this book as being to assist prospective lawyers in preparing for examinations and to convey to the general reader a picture of the problems in private international law. It is doubtful whether two such objects are completely compatible; but if they are not, at least the author goes a long way to make them appear so. From the point of view of the law student this is an excellent introduction to the subject and is sure to be widely recommended as preliminary reading. But the author

himself will probably be the first to admit that the limits of space imposed upon him inevitably lead to the exclusion of much detail and some general matter essential to a student preparing for law examinations. The reaction of a general reader is more difficult to assess. His position differs from that of the law student, in that the latter will usually have read law for at least two years before approaching this most difficult subject. One can at least surmise that the general reader will have to exercise sustained effort to comprehend all the ramifications of various general problems with which Mr. Thomas has dealt. This is no reflection either on the author or the general reader, but rather on the special nature of the subject involved. It is simply the difficulty of building a legal superstructure without legal foundations. The attempt which the author has made to overcome this formidable difficulty is entirely admirable. His writing is clear, his numerous examples of factual problems most helpful and his style is very readable without being chatty, yet one is left with the impression that so far as concerns the general reader too much information has been compressed into too few pages. No doubt many persons to whom this small volume is addressed will need to refer to the glossary of Latin terms compiled by the author.

Although the nature of a book of this kind gives little scope for original ideas in anything except style and treatment, the author makes two suggestions of great interest to scholars in this subject. In dealing with the law of succession (p. 130) Mr. Thomas suggests a solution of the dispute as to the date at which testamentary capacity should exist by proposing that the testator should have capacity by the law of his domicile both when making the will and when it becomes operative. Secondly, he makes an interesting classification of presumptions in the conflict of laws, treating irrebuttable presumptions as "true rules of law" and referable to the *lex causae*, other presumptions being regarded as of an evidentiary character and thus referable to the *lex fori*.

This book is up to date in its references, as complete as its size allows, and of a high standard of accuracy in its statement of law. It is open to criticism on a few matters, mostly of minor importance, of which it may assist the author to mention the following:

In an excellent introductory chapter he states (at p. 24) that English literature on this branch of the law has a very short history and refers to the first appearance of Dicey's important treatise in 1896. This statement gives the inaccurate impression that no English writing of importance took place before the end of the nineteenth century and ignores, among other works, Henry's *Foreign Judgments* in 1825, Burge's *Colonial and Foreign Law* in 1838, Westlake's *Private International Law* and Dicey's own *Law of Domicile* in 1879. Secondly, the author's main treatment of renvoi (pp. 29–31) is likely to give the impression that the problem only arises as between domicile and nationality, and does not concern immovables, so that the lay reader may realise with surprise later in the book (pp. 101, 129, 133) that the doctrine applies to land. To say, as the author does (at p. 36), that "polygamy is against public policy" is to make a wide statement of doubtful authority which is not entirely consistent with more traditional views expressed on pp. 46 and 47. At p. 82 the author argues in favour of capacity to contract by the proper law, but does not mention the logical objections to this proposal, that the proper law cannot be ascertained until capacity has been exercised, and that such a proposal would enable parties to a contract to confer capacity on themselves by the choice of an appropriate law. In dealing with negotiable instruments the author fails to make explicit a point that is implicit in his description of negotiable instruments, that the transferee obtains a better right than is possessed by his transferor. Obviously this only applies if the transferor's title is defective. It is a matter of record rather than of criticism that Mr. Thomas regards section 3 of the Wills Act, 1861, as confined to wills of British subjects.

This book deserves warm commendation as a general introduction to the subject for students. So far as the general reader is concerned, he will at least be made aware of the existence of problems in this branch of law.

R. H. Graveson.

Le Contrôle Judiciaire de L'Administration Anglaise. By Gilbert Tixier. Foreword by Professor Marcel Waline. [Paris: Libraire Dalloz. 1954. 187 pp.]

English students, conscious of defects in their own system of administrative law, have recently tended to turn towards the United States and France for sources of inspiration. Interest in the principles of French administrative law and the working of the Conseil d'Etat has been stimulated by the publication, within the space of less than two years, of comparative studies by Professors Street, Mitchell, Schwartz and Hamson. Few will be surprised to learn that French lawyers have not shown an equal urge to seek enlightenment on this side of the Channel. It is nevertheless strange that M. Tixier's monograph is the first to have been written by a Frenchman for Frenchmen on judicial review of administrative action in England.

The author is a young French academic lawyer who is also a member of the English bar. He begins his book with a good historical introduction and an account of the sources of English law and the system of courts, and goes on to discuss the methods of review, the *ultra vires* doctrine, the concept of natural justice and the standard of reasonableness. On the whole he has succeeded in presenting a clear outline of a difficult subject. But in this branch of the law simplicity too easily becomes over-simplification, and accuracy cannot be achieved without elaborate classification and cautious qualification which will necessarily blur the outlines. As a starting-point for further investigation by French students, M. Tixier's work should, however, prove helpful. It is a pity that it should be marred by countless misprints and a large number of inaccurate citations: *Wilts* v. *United Dairies, Ltd.* (1922) 91 L.R.K.B. 897 (cited with a different but also inaccurate reference in the index) is a sample. Mistakes on important points of substance are rare; but it is not correct to say that orders of mandamus cannot be addressed to Crown servants or that certiorari will issue to quash decisions for unreasonableness. An application for certiorari is described in out-of-date terminology. There are a few errors in the account of the jurisdiction of the courts. Also, one has the impression that the writing was completed a long time before publication. This may explain the absence of any reference to *R.* v. *Manchester Legal Aid Committee* or *Barnard* v. *National Dock Labour Board,* which would surely have caused the author to soften the asperity of his comments on the scope of judicial review.

M. Tixier has found little to admire in the state of English administrative law. The *ultra vires* rule is ineffective; natural justice is disregarded; reasons are seldom given for decisions; unreasonable decisions often stand inviolate; inspectors' reports are not disclosed; Ministers determine justiciable issues in which they have a departmental interest; the composition and procedure of administrative tribunals are unsatisfactory. These matters would be put right by drastic reforms, but the changes would not include the transplantation of the Conseil d'Etat to an alien soil; instead, there should be created a special Division of the High Court with extended powers of review, including the power to apply the substantial evidence rule to administrative findings of fact.

Those of us who find rather less to condemn in the present law, but who are aware of the need for raising standards of administrative

adjudication and improving the techniques of judicial review, may profit by reflecting upon the criticisms of a foreign observer whose native system affords better protection to individual rights than our own, even if we are unable to accept all his suggestions for setting our house in order.

S. A. de Smith.

Précis du Droit Public de la Finlande. By Prof. V. Merikoski. [Helsinki: Akateeminen Kirjakauppa. 1954. xii and 253 and 41 (Tables and Annexe) pp.]

This is the first volume of the series *Ius Finlandiae* to be published by the Association of Finnish Lawyers. The series is intended to cover the whole legal system of Finland, and it will be published in the main European languages. With the present volume, in French, the series has got off to a good start. This volume purports to describe the constitutional and administrative law of Finland, but, because of its title, its scope is rather wider than might be expected by the English reader. There is, for example, a short exposition of the system of taxation (central and local), and of the treatment of alcoholics and habitual criminals, since these can come under the heading of "*Formes de contrainte administrative*." At the same time, it is a book which takes little for granted, definitions abound, even of such terms as administrative authority. It is therefore inevitable, when the size of the book is remembered, that the description which it gives should be general. As an introduction for students to a Continental method of government and law it is entirely admirable. It gives a clear and well-ordered picture. For those who already have some idea of public law outside this Kingdom, it has, for the same reasons, some disadvantages; they may wish that more detail had been given, and may be left with unanswered questions about some of the generalities it contains.

Even for this second group there is, however, much of interest, for it is surprising how much information Professor Merikoski has managed to pack into this book. The constitution is not a simple one, it is complicated by linguistic and religious provisions, and it has to provide for a state which is neither strictly federal nor strictly unitary, because of the special treatment of the Aland Isles. Moreover, the troubled background to the constitution has left its mark in the practical aspect of some of the fundamental rights which it contains. On the side of administrative law there are interesting variants in the powers and composition of the administrative courts and in the position of *Délégué judiciaire de la Chambre*. The latter is elected by the Chamber of Representatives, without being a Minister properly so called, and is charged with supervising the legality of the administration on behalf of the Chamber.

Enough has been said to show that the book, though brief, makes interesting and stimulating reading. As one would expect from its origin it is excellently produced upon paper which it is a pleasure to handle.

J. D. B. Mitchell.

El Concepto del Derecho Mercantil and Estudios de Derecho Mercantil. By Professor Giron Tena. [Madrid: 1954 and 1955.]

Professor Giron Tena's latest works on mercantile law are important additions to any international lawyer's library, and valuable works of reference for all students of commercial law.

The first work is a philosophical and theoretical approach to commercial law generally, and the frequent references to foreign legislation, jurisprudence, and writers are by way of illustration of a point or confirmation of a theory.

The second work is to me the more attractive and practical of the two. It is an extraordinarily detailed and clear account of the history of Company and Partnership law in France, Germany, England, Switzerland, Italy, and of course Spain. After considering the past, Professor Giron Tena goes on to examine and compare the evolution of the various concepts and institutions in each country, and finally he sets out the current law and doctrine under each system. Professor Giron Tena also devotes sections to bills of exchange and banking transactions, which he analyses in the same way.

I am impressed with the remarkable attention to detail and with the most interesting recitals of medieval statutes which I now read for the first—and possibly for the last—time. For instance, the Ordinances of Blois of 1579 and the Code Michaud of 1629. The work is essentially of greater practical value in countries where comparative legislation plays a more vigorous part than in England. In Spain, for instance, a Pleading will frequently contain lengthy references to foreign law and doctrine, and the Spanish court will consider the judgments and writings of foreign courts and jurists. Their effect is not of course binding, but certainly persuasive; and Professor Giron Tena has eased the task of the practising Spanish and Latin-American lawyer by collecting in one work, I think for the first time, the salient elements and national characteristics of companies and associations under the principal systems of Europe.

Rafael Valls.

Annual Survey of South African Law, 1954. [Published for the Faculty of Law of the University of the Witwatersrand by Juta & Co., Ltd. Cape Town. 1955. xxxvi and 354 pp.]

This volume, which gives a complete account of the legislation, case law and literature produced in South Africa in 1954, has been edited by members of the Faculty of Law of the University of the Witwatersrand, and is composed of contributions written by academic and practising lawyers. It provides convincing testimony of the high standards attained in the administration and academic study of law in the Union. But the intellectual delight and stimulation which this book does provide for every lawyer will be marred for many by the numerous reminders, scattered throughout the book, of the policy of racial discrimination which is practised in that country. The clearest expression of the political climate is found, of course, in the section dealing with constitutional law. A case is reported there which asserts the common law right of the police to force their way into a private meeting if apprehensive that seditious speeches would be made. This decision purports to follow *Thomas* v. *Sawkins,* thus confirming the fears which were expressed at the time by the critics of that decision. On the other hand, the critics of *Bedder* and *McCarthy* will be interested to find that the South African courts continue to adhere to the subjective test in determining the presence of provocation.

Obviously, one of the great cases of the year in South Africa was *John Bell & Co., Ltd.* v. *Esselen,* where the Appellate Division, in holding that a company could not recover from the payee the proceeds of a cheque drawn by the secretary in settlement of a private debt, went rather out of its way to declare that the decisions of the Privy Council are of no more than persuasive authority. On the other hand, the decision of the Privy Council in *McKee* v. *McKee* [1951] A.C. 352, was followed by the High Court of

Southern Rhodesia. The significance of this gesture, however, may appear in a different light if it is remembered that in *McKee* v. *McKee* it was held that a foreign custody order does not possess the force of a foreign judgment. Consequently, the High Court of Southern Rhodesia could consider itself free to form its independent judgment on the custody of a child in respect of whom an order had been made by an English court.

The Contract Section contains, from the English lawyer's point of view, some of the most interesting material. In *Smeiman* v. *Volkersz* it was held that an offer made verbally *inter praesentes* does not give implied authority to the offeree to accept by post so as to complete the contract at the moment of posting. By limiting the scope of the rule as to acceptance by post, this decision, whatever its merits, tends in the direction taken more recently in this country in *Entores* v. *Miles Far East Corp.*, but if this case is disregarded, there remains little authority to support the dogmatic statement, made in the *Survey*, as well as frequently elsewhere, that "generally speaking, of course, a contract is not concluded unless the offeree communicates his acceptance to the offeror."

Another case reported in this section deals with the application of restraint of trade to the agreements, also in common use in this country, by which a garage is tied to a petrol company. This decision provides useful guidance on a point on which there appears to be little authority, apart from *Foley* v. *Classique Coaches* and from the analogy of tied public-houses.

The value of this *Survey*, apparent, it is hoped, from the few examples discussed here, would be even greater, at any rate to readers in this country without ready means of following up references to South African reports, if the facts of the cases given were to be stated more fully. It also seems rather excessive to divide the material into twenty-two sections, especially as there are no rubrics for the more academic subjects, such as Jurisprudence, Legal History or Public International Law. At present, there is a great deal of unnecessary repetition, as in the case of *Bell* v. *Esselen*, mentioned above, which appears, with rather inadequate cross-references, in no less than five sections. In some instances these duplicate reports are not easily reconciled, and again, on a few occasions, the principal discussion of an item is not to be found in what would seem the most appropriate context. But these are, indeed, small matters, possibly without any relevance to the needs and habits of the South African profession for whom the book is primarily intended.

J. Unger.

Entscheidungen des Bundesverfassungsgerichts. Edited by Members of the Federal Constitutional Court. Vol. 3. viii and 456 pp. [1954. J. C. B. Mohr (Paul Siebeck), Tübingen. 25 DM.]

In notes on the earlier volumes of decisions of the German Constitutional Court the present reviewer has expressed the opinion that no serious contemporary observer of German affairs can possibly obtain a true perspective of the currents and cross-currents in the perplexing scene of modern German life. This statement is no less true of the present volume which contains two judgments which have created a considerable stir in Germany and have been reported in the general press throughout the world. The first of these judgments—now generally referred to as the "Beamtenurteil"—has ruled that every civil service relationship existing between an individual and the German Reich came to an end with the downfall of the Hitler system. No doubt, the decision as such was less remarkable to most critics than the arguments on which it was based. The court refused to seek refuge in adopting one or the other of the various competing theories on the legal

nature of the strange situation created in Germany by the various acts of the Allied Powers, the "unconditional surrender," the disappearance in fact of the Reich and its State power, etc., or in resorting to a mere technical solution based on a restrictive interpretation of the rules on continuation of liability in case of State succession. In the court's view the civil service relationship—at all times one of the pillars of German national life—was perverted during the course of the Hitler régime into a personal tie between the individual and the dictator to such an extent that there could be no room for survival once the dictatorship had come to an end. There could consequently be no "well-acquired rights" resulting from that period and no claims could be maintained other than those resulting from the positive law of the Federal Republic, which has, of course, made some provision for civil servants not re-engaged. Few Supreme Court judgments have ever been more bitterly attacked in Germany. This will not be found surprising by anybody who relishes—as does the present reviewer—the outspoken frankness with which the court has presented the picture of the civil service law as it stood during the Hitler period and has enjoyed the numerous quotations from legal works written during that time whose authors are now trying to live down—though not to withdraw—what they wrote then. The second judgment—commonly styled "Soldatenurteil"—deals with the position of professional soldiers and comes to similar conclusions. Both judgments are eloquent evidence of the supreme importance of this court as a guardian of democracy in the Federal Republic. Many attempts of course are being made to undermine its position. Foreign observers will do well to watch the fate of this court with sympathy and anxiety.

The present volume includes a list of the court's judges. This is a welcome innovation in Germany, where the impersonal character of judicial work has for long been a cause of complaints.

E. J. Cohn.

Yearbook on Human Rights for 1952. Compiled by the Human Rights Division of the United Nations Secretariat. [New York: United Nations. London: H.M.S.O. 1954. xv and 490 pp. 37s. 6d.]

In publishing the 1952 *Yearbook on Human Rights,* the Human Rights Division of the United Nations Secretariat has ensured that international lawyers generally, and especially those interested in the promotion of human rights as legal rights, remain firmly in its debt.

As with its predecessors, the current volume is divided into four parts. The largest is devoted to national law and decisions of national courts—the present reviewer can never accustom himself to finding legislation like the South African Group Areas Amendment Act, which includes within the coloured group "any white man between whom and a woman who is . . . a member of the coloured group, there exists a marriage or who cohabits with such a woman," in a volume devoted to human rights. It is like a breath of fresh air to turn from this to the decision of the Supreme Court of South Africa in *R.* v. *Ormonde*, 1952 (1) S.A.L.R. 272, in which it was held that discriminatory legal provisions should be interpreted in favour of the offender, and that the burden of proving a person coloured lay positively upon the prosecution. There are no judicial decisions from the United Kingdom. Instead there is a note on the independence of the judges by Birkett L.J., while English legislation is represented by the 1952 Defamation Act.

The other three sections of the volume deal with laws and texts on human rights in trust and non-self-governing territories, including the text of the Gambian Deportation (Immigrant British Subjects) Ordinance, 1952; treaties and agreements adopted under the auspices of the United Nations, specialised

agencies and other inter-governmental agencies; and a final section devoted to the work of the United Nations itself in the field of human rights, dealing with such matters as the Draft International Covenant on Human Rights and measures for implementation, freedom of information, the status of women, the protection of minorities and the prevention of discrimination, trade union rights and forced labour, and such specific questions as the racial situation in South Africa and the plight of concentration camp survivors.

Whether one seeks information on countries which are well known for their respect for human rights or on those with less envious reputations, the *Yearbooks on Human Rights* constitute the most comprehensive collection of information in this field that one could hope to find. This volume alone contains details of the position in, among others, Latin America, the satellite countries of Eastern Europe, Eritrea, Ethiopia and revolutionary Egypt.

L. C. Green.

The Concise Law Dictionary. By P. G. Osborn. Fourth edition. [London: Sweet & Maxwell. 399 pp. 18s. 6d.]

The compiler of a work such as this has always one problem before him; shall he explain the word or phrase in everyday language or is a technical definition required? By and large the author has solved the problem satisfactorily, although objection might be made, for example, to dismissing "Custodes pacis" as "The justices of the peace (q.v.)," without a reference to the Act of Edward III. Where a technical definition has been given, the appropriate statute has almost invariably been cited, but the references to leading cases are not so frequent. "Accomplice," for example, is defined with *Davies* v. *D. P. P.* in mind, and yet no case is cited. The author, no doubt, is mindful of the danger of making the Dictionary a mere list of leading cases.

Latin words and phrases repeatedly occur. Many are Roman law terms, but are these not explained in the textbooks? Others scarcely seem to deserve inclusion; *a fortiori*, *ex cathedra*, and so forth. As for the maxims, Lord Shaw's observation upon *res ipsa loquitur* in *Ballard* v. *N. B. Ry.* applies; "Had it not been in Latin, nobody would have called it a principle"; and judicious pruning will cause few regrets.

The heresy of the action on the case and *in consimili casu* again rears its ugly head; the student ought surely to have been referred to the arguments of Professor Plucknett and Miss Dix. In a work intended, in part, for students, there are no references to current legal literature, which is to be regretted. The list of law reports contains what may be a unique feature, namely, the number of volumes forming each series, as well as the period covered.

Allister Lonsdale.

Learning the Law. By Glanville Williams, ll.d. Fifth edition. [London: Stevens & Sons, Ltd. 1954. ix and 216 pp. 13s. 6d. net.]

In this edition the author has added a chapter on the interpretation of statutes which, besides an account of the principal rules of interpretation, explains the conflict between the liberal and the strict approaches to statute law. He may be too optimistic to describe as a thing of the past the belief of the judges in the superior quality of the common law as compared to legislation, and, indeed, from the point of view of formal expression, this belief is perhaps not without foundation. But to have raised this and other

points of equal significance shows that Doctor Williams does not believe in writing down for the beginner, which may account largely for the success of his book.

THE BRITISH JOURNAL OF ADMINISTRATIVE LAW. [London: Shaw & Sons, Ltd.; Jordan & Sons, Ltd. 45s. per annum.]

THIS journal, the first to be devoted to questions of English administrative law, is now entering upon its second year of publication. Its contents comprise editorial comment, articles (which are in the main brief), local government notes, book reviews and the administrative law reports. These reports occupy a considerable part of each issue. They consist of summarised reports of decisions of superior courts in the United Kingdom on administrative law matters, and also of decisions of administrative and domestic tribunals and other specialised courts.

Books and Publications Received

KONSTAM ON INCOME TAX. Cumulative Supplement to the Twelfth edition. August, 1955. xiv and 81 pp. 7s. 6d. net. [London: Stevens & Sons, Ltd.]

WOODFALL'S LAW OF LANDLORD AND TENANT. Twenty-fifth edition. Supplement to February 1, 1955. By LIONEL A. BLUNDELL, LL.M., and V. G. WELLINGS M.A. 6s. 6d. net. Main work with Permanent Supplement and Supplement to February 1, 1955. £7 17s. 6d. net. [London: Sweet & Maxwell, Ltd.]

ESTATE DUTY AND PRIVATE COMPANIES. By A. R. FLERSIC, M.SC., B.COM. Reprinted with revisions from Accounting Research, Vol. 5, No. 2. May, 1954. 26 pp. [The Incorporated Accountants' Research Committee. 1955. 4s.]

ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE. Thirty-third edition. Sixth Cumulative Supplement. September 1, 1955. Edited by T. R. FITZWALTER BUTLER and MARSTON GARSIA. [London: Sweet & Maxwell, Ltd.]

CRIMINAL DIGEST OF INDIA (1904 TO 1953). Vol. II. [All India Reporters, Ltd., Congress Nagar, Nagbur I.]

THE LAW: ITS STUDY AND COMPARISON. An Inaugural Lecture by C. J. HAMSON, Professor of Comparative Law in the University of Cambridge. [Cambridge: at the University Press. 1955. 29 pp. 2s. 6d. net.]

DEFENSE DES LIBERTÉS DEMOCRATIQUES. Interventions et documents de la Conférence Internationale des Juristes pour la Défense des Libertés Démocratiques (Vienne, 1954). [Brussels: L'Association Internationale des Juristes Democratiques. 1955. 245 pp.]

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